Ontario

Commission on Freedom of Information and Individual Privacy

Public Access to Commercial Information in Government Files

Research Publication **17**

PUBLIC ACCESS TO COMMERCIAL INFORMATION IN GOVERNMENT FILES

by Susan Soloway

Research Publication 17

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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of government information;

3. The categories of government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 17. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn by having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The purpose of freedom of information legislation, broadly stated, is to facilitate public scrutiny of the conduct of government by enabling interested individuals to obtain access to government documents. Legitimate interests of public institutions in maintaining confidentiality with respect to certain kinds of information are typically recognized in such legislation by the adoption of provisions exempting certain categories of information from the general rule permitting members of the public to examine government records. The present paper considers various problems involved in designing an exemption to protect from public access certain kinds of commmercially valuable information.

The category of commercial information which is most obviously a candidate for exemption under the statute is constituted by the trade secrets of commercial corporations. Information concerning manufacturing processes or other matters which would be protected by the law pertaining to trade secrets may be submitted to governmental institutions by private sector firms. Such information might be supplied voluntarily in order to enable the government to engage in certain kinds of planning activity or it may be submitted on an involuntary basis in order to secure certain kinds of governmental approvals or licences. Freedom of information legislation typically exempts such material from the general rule permitting public access to government documents. Apart from this central core of commercially valuable information, however, government institutions collect other information from business firms which, if disclosed, might seriously prejudice the competitive interests of the firm which has supplied the information in question. Further, government institutions themselves generate commercially valuable information, as where a particular institution conducts essentially commercial activity or engages in research which has a commercial application.

In fashioning an exemption to a freedom of information scheme to accommodate the need for confidentiality in the treatment of materials of this kind, a number of interesting questions arise. First, it must be determined how commercially valuable information in need of protection is to be distinguished from other kinds of information about business concerns found in government files. In other words, how can one define a statutory standard so as to identify only that information which is in need of protection? Second, what procedural safeguards, if any, should be accorded to business firms whose trade secrets or other commercially valuable information are the subject of a freedom of information act request? Should business firms be granted the right to forbid such disclosure or an opportunity to make their views known to the institution receiving the request in some formal manner? Third, are there situations in which the public interest in disclosure (where, for example, the information requested relates to matters of environmental protection) should override the interest of the business firm in

confidentiality? If so, how are such situations to be identified in a statutory freedom of information scheme? Finally, what recognition should be accorded to the interests of government institutions in proprietary information in the design of a freedom of information policy?

The author of this paper, Ms. Susan Soloway, was invited to undertake research which would assist the Commission in resolving these questions and a number of related matters. The paper contains a description of the activities of the government of Ontario which generate information of this kind and attempts to identify the interests of business firms and government institutions in confidentiality with respect to this material, as well as the competing interests in public disclosure. The American experience with respect to these issues under the provisions of the federal Freedom of Information Act is described and compared to the operation of pertinent provisions of Swedish information access laws and proposals recently brought forward by the federal governments in Australia and Canada. In a final chapter, the author offers her own suggestions for the resolution of these problems in a statutory freedom of information scheme.

Ms. Soloway is a member of the Ontario Bar and a graduate of Osgoode Hall Law School of York University. Prior to undertaking legal studies, Ms. Soloway completed a Masters Degree in Political Science at the University of California. Ms. Soloway was a member of the Commission's research staff for approximately two years.

Grateful acknowlegement must be made of the helpful contribution of Mr. Bret Mecredy-Williams, a student of the LLB program at Osgoode Hall Law School, to the completion of this paper. Under severe time constraints, Mr. Mecredy-Williams prepared an edited version of the footnote material for the paper. The body of the manuscript was edited by Ms. Natalie Gold, a member of the Commission's staff. During the summer months of 1978, research assistance was provided by Mr. Cliff Dresner, a graduate of Osgoode Hall Law School of York University. It should be noted that the interviews which form the basis for this paper were conducted by the author and her research assistant during the period from May through September of 1978.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. It should be emphasized, however, that the views expressed in this study are those of the author, and that they do not necessarily represent the views of the Commission.

Particulars of other research papers which have been published to date by the Commission are to be found on page 144.

John D. McCamus
Director of Research

PUBLIC ACCESS TO
COMMERCIAL INFORMATION
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CHAPTER I

INTRODUCTION

In recent years, there has been a growing concern in Canada that the present restrictions on public access to government documents are incompatible with democratic principles. Unlike Sweden and the United States, which have legislated a right of access to government information, most governments in Canada have only a limited legal obligation to make information in their files available to the public.

The law in Ontario is no exception. The provincial Cabinet and the ministries for which its members are responsible are generally permitted to operate in secret, virtually shielded from public view. This secrecy is reinforced by the doctrines of ministerial responsibility and Crown privilege, by the legal limitations on those seeking information from government, by the civil servant's oath of office, and by express statutory proscriptions against disclosure.

Much of the information withheld from the public is generated in the course of government's involvement in the marketplace. In its various capacities as a customer of goods and services, a licensor of commercial activity, a regulator of numerous phases of business operations, a revenue collector, an auditor, an inspector, an investigator, a

subsidizer, a lender, and an economic planner -- the government obtains, generates and maintains a variety of financial, technical, scientific and other commercially valuable information. The secrecy surrounding this information, although attributable in part to the nature of government operations, is rooted in the competitive characteristics of the marketplace. Like other assets in the marketplace, information has a commercial value which has been traditionally protected through secrecy by public and private enterprise alike.

Freedom of information legislation, if enacted in Ontario, would encroach on present secrecy by permitting public access to government files which contain commercially valuable information. Freedom of information statutes enacted or proposed elsewhere have attempted to strike a balance between the conflicting interests of access and secrecy by exempting, to some degree, commercially valuable information from public access. A difficult issue for any government considering access legislation is where that balance should be struck.

As part of the background research for the Commission on Freedom of Information and Individual Privacy, this paper attempts to assess the potential benefits to be derived from a policy of greater public access to government-held information of commercial value. It begins by briefly canvassing the types of government activity which use commercially-valuable information. In turn, the analysis attempts to identify the public, government, and private interests in the continued secrecy of such information. Finally, guided by the experience and

proposals of other jurisdictions, it suggests an appropriate balance to be struck between access and business secrecy in Ontario. The discussion is based on material from government files, from information gathered during visits to the record centres of various ministries, from interviews conducted with government officials, and from interviews with the representatives of twenty businesses operating in the province.

CHAPTER II

PRESENT FRAMEWORK FOR ACCESS AND SECRECY

At present, the secrecy and accessibility of information in provincial files is governed by parliamentary tradition and legal principle. The doctrine of ministerial responsibility, which arises out of parliamentary traditions, presumes that ministers alone are accountable for the conduct of their ministries. According to this theory, it is the minister who determines policy, oversees its implementation, and in turn is responsible for the disclosure of information about ministry activities to the legislature and the public.[1]

Public servants who administer government policy and offer advice must swear the following oath:

> ... except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.[2]

Although there is no statutory penalty for a breach of this oath,[3] it does impose a moral obligation of silence on public servants.

1 See K. Kernaghan, Freedom of Information and Ministerial Responsibility (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 2, 1979).

2 The Public Service Act, R.S.O. 1970, c. 386, s. 10(1).

3 Several provincial statutes do require public servants to swear additional oaths to which penalties for breach attach.

Several common law and statutory principles govern the accessibility and secrecy of information in government files. Any person who tries to obtain information through the courts must demonstrate a clear statutory duty on the part of government to disclose it.[4] An applicant must also establish a special interest in the subject matter to which the information pertains.[5] In the opinion of one observer, "mere curiosity and desire to see and inspect documents is not sufficient" to entitle a person to gain access to government records.[6] Moreover, the concept of Crown privilege limits access by providing ministers with a common law immunity from pre-trial discovery procedures and permits them to withhold information from legal proceedings when they deem non-disclosure to be in the public interest.[7]

4 See Rossi v. The Queen, [1974] 1 F.C. 531 (F.C.T.D.) For additional comment, see S. Silverstone, "Access to Government Information: Administrative Secrecy and Natural Justice," (1975), 10 U.B.C.L. Rev. 235.

5 See R. v. Southwold Corp; Ex p. Wrightson (1907), 97 L.T. 431 (K.B.D.).

6 T.M. Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, 1977) at 9.

7 It has been held that the Court itself may preclude disclosure of government information when it would be injurious to the public interest or security, regardless of whether the Crown has sought to exercise its privilege.

See Carter v. Carter (1975), 53 D.L.R. (3d) 491 (Ont. S.C.). For a discussion of the difficulties surrounding Crown privilege see S.N. Lederman, "The Crown's Right to Suppress Information Sought in the Litigation Process: the Elusive Public Interest" (1973), 8 U.B.C.L. Rev. 272, and E. Koroway, "Confidentiality in the Law of Evidence" (1978), 16 Osgoode Hall L.J. 361.

A number of provincial statutes regulate the disclosure by public servants of commercially valuable information, particularly that which pertains to the internal operations of private business entitities.[8] There is considerable variation in the statutory language; consequently, a precise characterization of the legislation is difficult. However, the statutory framework does evidence varying degrees of openness and secrecy.

A. Statutory Secrecy

Secrecy is governed by three types of provisions: those prohibiting disclosure, those restricting it, and those granting discretion to certain designated officials to withhold information usually accessible to the public. The most stringent secrecy provisions are found in statutes prohibiting disclosure of any information obtained in the course of administering a particular statutory scheme. Subsection 14(1) of The Retail Sales Tax Act[9] is illustrative:

> Subject to subsection 2, no person employed by the Government of Ontario shall communicate or allow to be communicated to any person not legally entitled thereto any information

8 For a more detailed discussion of the statutes that regulate the accessibility of government information, see T.G. Brown, Government Secrecy, Individual Privacy and the Public's Right to Know: An Overview of the Ontario Law (Toronto: Commission on Freedom of Information and Individual Privacy, Research Publication 11, 1979).

9 The Retail Sales Tax Act, R.S.O. 1970, c. 415, c. 14(1).

> obtained under this Act, or allow any such person to inspect or have access to any written statement furnished under this Act. [10]

Similar provisions are found in other provincial taxing statutes[11] and in the federal Statistics Act, which governs the disclosure of most statistical information in Ontario.[12]

Other provisions do not entirely prohibit the disclosure of information obtained in the course of administering a particular scheme, but limit it to specified circumstances. These provisions frequently appear in statutes governing the licensing or registration of a particular business. For example, section 25b(1) of The Mortgage Brokers Act provides:

> Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 22, 23, 24, 25, or 25a shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry,

10 Subsection 14(2) permits disclosure to federal and provincial governments who have reciprocal information sharing arrangements with Ontario.

11 Other taxing statutes with similar provisions include:
The Corporations Tax Act, 1972, S.O. 1972, c. 143, s. 12.
The Gasoline Tax Act, 1973, S.O. 1973, c. 99, s. 30.
The Gift Tax Act, 1972, S.O. 1972, s. 2, s. 54(10).
The Mining Tax Act, 1972, S.O. 1972, c. 140, s. 11(1).
The Motor Vehicle Fuel Tax Act, R.S.O. 1970. c. 282, s. 19(1).
The Tobacco Tax Act, R.S.O. 1970, c. 463, s. 12.

12 R.S.C. 1970, c. 257. See discussion pertaining to the collection of statistical information in the province, infra, and The Statistics Act, R.S.O. 1970, c. 443.

inspection or investigation and shall not communicate any matters to any other person except,

a) as may be required in connection with the Administration of this Act and the regulations or any proceedings under this act or the regulations; or
b) to his counsel; or
c) with the consent of the person to whom the information relates. [13]

Similar (and in most cases, identical) language is found in other licensing statutes.[14]

Several statutes which require specified information to be made accessible to the public also grant discretion to designated officials to withhold that information in certain circumstances. The Environmental Assessment Act,[15] for example, provides that environmental assessments be made available to the public for inspection. However, section 31 of the Act states:

13 The Mortgage Brokers Act, R.S.O. 1970, c. 278, s. 25(b)(1) as amended by S.O. 1971, c. 50, s. 59(3).

14 Some statutes that contain similar provisions include:
The Bailiffs Act, R.S.O. 1970, c. 38, as amended by S.O. 1971, c. 50, s. 10(11), adding s. 14a.
The Collection Agencies Act, R.S.O. 1970, c. 71, as amended by S.O. 1971, c. 50, s. 21(4), adding s. 26b.
The Consumer Protection Act, R.S.O. 1970, c. 82, as amended by S.O. 1971, c. 50, s. 23(7), adding s. 29a.
The Motor Vehicle Dealers Act, R.S.O. 1970, c. 475, as amended by S.O. 1971, c. 50, s. 85(4), adding s. 25b.
The Real Estate and Business Brokers Act, R.S.O. 1970, as amended by S.O. 1971, c. 50, s. 76(5), adding s. 27b.
The Upholstered and Stuffed Articles Act, R.S.O. 1970, c. 474, as amended by S.O. 1971, c. 50, s. 84(5), adding s. 9a.
The Travel Industry Act, 1974, S.O. 1974, c. 115, s. 21.

15 S.O. 1975, c. 69, see infra p. 27.

> Notwithstanding any other provisions of this Act, where the Minister is of the opinion that compliance with any provision of this Act is causing, will cause, or will likely cause the disclosure of matters that are of such a nature that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of disclosing such matters to the public, the Minister may make such order for the protection of such person or the public interest as he considers necessary or advisable.

Similarly, The Securities Act, 1978[16] requires information about gross sales of public companies filed with the Ontario Securities Commission to be open to public inspection. However, companies may request an exemption from this requirement from the OSC on the ground that disclosure "would be unduly detrimental to the interests of the corporation."

B. Statutory Access

The statutory provisions which reflect different degrees of openness fall into three general categories; those requiring public access to information, those requiring disclosure of specific information, and those granting discretion to disclose otherwise secret information.

Some statutory provisions require private business entities to file information about their operations with government for the express purpose of public disclosure. Most of these provisions appear in

16 The Securities Act, 1978, c. 47, s. 79(a)(ii).

statutes governing information used by the shareholders and creditors of corporations. The Corporations Information Act[17] requires companies incorporated under The Business Corporations Act, The Corporations Act and The Co-operative Corporations Act, 1973 to make certain information, such as the names and addresses of directors and the location of head office, publicly available. Further,

> Upon the payment of the prescribed fee, any person is entitled to examine the record of any document filed under section 2, 3, 4 and 5 or a predecessor thereof and to make extracts therefrom.
>
> Upon the payment of the prescribed fee, the Minister shall furnish any person with a certified copy of the contents of any document filed with him under section 2, 3, 4 or 5 and any predecessor thereof. [18]

Additional information must be disclosed under The Business Corporations Act and The Securities Act. The Business Corporations Act requires that certain information be maintained by a corporation and be readily available to shareholders for inspection.[19] The Securities Act requires companies wishing to make a distribution of securities to the public to file a prospectus[20] including information such as a description of the company's business and development, the location of its principal properties, the identity and remuneration of officers,

17 The Corporations Information Act 1976, S.O. 1976, c. 66, section 3 and 8.

18 Id., s. 7.

19 The Business Corporations Act, R.S.O. 1970, c. 53, s. 157 as amended by S.O. 1972, c. 138, s. 40(1).

20 Supra note 16, s. 51.

and certain financial statements.[21] The same statute requires those defined as insiders of a corporation to file a report with the Ontario Securities Commission.[22] This report must be made available to the public.[23]

Other provincial statutes provide for access by means of a public register. For example, The Corporation Securities Registration Act permits public access to information pertaining to securities registered against corporate assets:

> Upon payment of the prescribed fees, every person shall have access to and is entitled to inspect the books of the Minister containing records or entries of mortgages, charges, or assignments or documents registered or filed under this Act, and no person shall be required as a condition of his right thereto to disclose the name of the person in respect of whom such access or inspection is sought, and the Minister shall, upon request accompanied by payment of the prescribed fees, produce for inspection any mortgage, charge, assignment, or document so registered or filed.[24]

Similar systems permit public access to information about interests in land[25] and personal property.[26]

21 Regulations under The Securities Act, O. Reg. 478/79 as amended by O. Regs. 602/79, 804/79, 39/80, Forms 12, 13 and 14.

22 The Securities Act 1978, supra note 16, s. 102.

23 Id., s. 116.

24 R.S.O. 1970, c. 88, s. 11.

25 The Land Titles Act, R.S.O. 1970, c. 234, and The Registry Act, R.S.O. 1970, c. 409.

26 The Personal Property Security Act, R.S.O. 1970, c. 344.

Many provincial statutes prohibiting or restricting disclosure also include provisions requiring certain specified information to be made publicly accessible.[27] In some instances the vehicle for access is the posting of a notice; for example, The Occupational Health and Safety Act, 1978 requires that any directions issued by inspectors to employers or any inspection report given to an employer be posted in the work place in a conspicuous manner for the benefit of employees.[28]

Other statutes require government agencies to compile certain information and grant a public right of access to these records.[29] The Environmental Protection Act[30] stipulates that the Ministry of

27 While not exhaustive, the following is a list of statutes requiring that certain specific information be made available to the public:
The Abandoned Orchards Act, R.S.O. 1970, c. 1, s. 4.
The Credit Unions Act, S.O. 1976, c. 62.
The Environmental Assessment Act, S.O. 1975, c. 69, s. 7.
The Forestry Act, R.S.O. 1970, c. 181, s. 5.
The Liquor Licence Act, S.O. 1975, c. 40, ss. 6 and 14.
The Vital Statistics Act, R.S.O. 1970, c. 483, s. 39.

28 S.O. 1978, c. 83, s. 29(5).

29 Although not exhaustive, the following is a list of statutes that requires that specified documents must be made available to the public:
The Assessment Act, R.S.O. 1970, c. 32, s. 49(2): rolls.
The Business Practices Act, 1974, S.O. 1974, c. 131, s. 5: assurances of voluntary compliance and orders to cease unfair practices.
The Creditors' Relief Act, R.S.O. 1970, c. 97, s. 5(c): records of money collected under an execution.
The Environmental Assessment Act, 1975, S.O. 1975, c. 69, s. 7: notice of, and inspection of assessment review.
The Funeral Services Act, 1976, S.O. 1976, c. 83, s. 34(2): by-laws.
The Insurance Act, R.S.O. 1970, c. 190, s. 8: record of all licences.
The Ontario Highway Transport Board Act, R.S.O. 1970, c. 316, s. 24(3): certified copies of orders, decisions, certificates, or other documents issued by the Board.

30 The Environmental Protection Act, 1971, S.O. 1971, c. 86, s. 19.

the Environment must keep an alphabetical index of any private business which has received an order or approval under the Act. The index must be made publicly available.

Numerous provincial statutes provide for limited public access through the tabling of annual reports.[31] For example, The Insurance Act, under which provincial insurance companies are licensed, requires an annual inspection of insurers. A report of this inspection must be tabled annually before the legislature.[32]

31 Although not exhaustive, the following is a list of statutes that also contain provisions requiring the mandatory filing of an annual report:
The Agricultural Rehabilitation and Development Act, R.S.O. 1970, c. 12.
The Co-operative Loans Act, R.S.O. 1970, c. 86, s. 2(9).
The Coop Insurance Act, R.S.O. 1970, c. 98, s. 12.
The Development Corporations Act, 1973, c. 84, s. 25.
The Farm Income Stabilization Act, 1976, S.O. 1976, c. 77, s. 15.
The Farm Products Payments Act, R.S.O. 1970, c. 163, s. 6.
The Fisheries Loans Act, R.S.O. 1970, c. 175, s. 2.
The Funeral Services Act, 1976, S.O. 1976, c. 83, ss. 2(8), 16(1).
The Liquor Control Act, 1975, S.O. 1975, c. 27, s. 7.
The Ministry of Agriculture and Food Act, R.S.O. 1970. c. 109, s. 8.
The Ministry of Energy Act, S.O. 1973, c. 56, s. 11.
The Ministry of Government Services Act, 1973, S.O. 1973, c. 2, s. 15.
The Ministry of Labour Act, R.S.O. 1970, c. 117, s. 7.
The Ministry of Natural Resources Act, 1972, S.O. 1972, c. 4, s. 11.
The Ministry of Transportation and Communications Act, 1971, S.O. 1971, c. 13, s. 10.
The Ministry of Treasury, Economics and Intergovernmental Affairs Act, 1972, S.O. 1972, c. 3, s. 13.
The Ontario Energy Board Act, R.S.O. 1970, c. 312, s. 9(2).
The Ontario Energy Corporation Act, 1974, S.O. 1974, c. 101, s. 22(2).
The Ontario Food Terminal Act, R.S.O. 1970, c. 313, s. 9.
The Ontario Food Council Act, R.S.O. 1970, c. 328, s. 9.
The Power Commission Act, R.S.O. 1970, c. 354, s. 10.
The Sheridan Park Corporation Act, R.S.O. 1970, c. 433, s. 14.
The Workmen's Compensation Act, R.S.O. 1970, c. 505, s. 81c(2).

32 The Insurance Act, R.S.O. 1970, c. 190, ss. 18, 19.

Several other statutes prohibiting or restricting designated public servants from disclosing information obtained in the course of their duties grant discretion to disclose to a superior official.[33] These provisions frequently govern information obtained by inspectors and investigators.[34] For example, section 22 of The Building Code Act states:

> (1) A chief official, inspector, person who, at the request of an inspector, accompanies an inspector, or person who, at the request of an inspector, makes an examination, test or inquiry or takes samples shall not publish, disclose or communicate to any person any information, material, statement or result of any test, acquired, furnished, obtained, made or received under the powers conferred under this Act and the regulations except for the purposes of carrying out his duties under this Act or the regulations.
>
> (2) No report of a chief official, inspector, person who, at the request of an inspector, accompanies an inspector, or person who, at the request of an inspector, makes an examination, test or inquiry or takes samples shall be communicated, disclosed or published to any person except for the purposes of carrying out his duties under this Act or the regulations. [35]

However, the statute does permit disclosure of the same material at the discretion of the director:

> (4) The Director may communicate or allow to be communicated, disclosed or published information, material or statements or the result of a test acquired, furnished, obtained, made or received under the powers conferred by this Act and the regulations. [36]

33 See The Energy Act, 1971, S.O. 1971, c. 44 and The Occupational Health and Safety Act, 1978, S.O. 1978, c. 83.

34 The confidentiality of documents seized in the course of investigations was recently addressed in Canadian Javelin Ltd. v. Sparling, [1979] 1 F.C. 334, per Mahoney J.

35 The Building Code Act, 1974, S.O. 1974, c. 74.

36 Id., s. 22(4).

Other statutes prohibit disclosure of specified information, but grant broad discretion to a minister. For example, The Securities Act, 1978, states:

> Where an investigation has been made under section 11, the Commission may, and where an investigation has been made under section 13, the person making the investigation shall report the result thereof, including the evidence, findings, comments, and recommendations, to the Minister, and the Minister may cause the report to be published in whole or in part in such manner as he considers proper. [37]

Similarly, The Environmental Protection Act requires the confidentiality of certain information but grants discretion to the minister to disclose such information for the purposes of administration and enforcement of the Act.[38]

The preceding survey of Ontario statutes is by no means exhaustive. Numerous other types of provisions regulate secrecy and openness, governing such matters as the non-compellability of public servants as witnesses in courts of law,[39] the confidentiality of specific information supplied to government,[40] and the secrecy of the identity of informants.[41] However, unless statutes permit disclosure by public

37 The Securities Act, 1978, S.O. 1978, c. 47, s. 15.

38 The Environmental Protection Act, 1971, S.O. 1971, c. 86, s. 87.

39 See, e.g., The Energy Act, 1971, S.O. 1971, c. 44, s. 6(2) and The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 45(3) and (4).

40 See, e.g., The Mortgage Brokers Act, R.S.O. 1970, c. 278, s. 27(4).

41 See, e.g., The Business Practices Act, 1974, S.O. 1974, c. 141.

servants, any information acquired and maintained in the course of developing and administering government programs must, according to the doctrine of ministerial responsibility, be withheld from the public. Access is therefore the exception to the rule of secrecy.

CHAPTER III

GOVERNMENT'S ROLE IN THE MARKETPLACE AND THE PUBLIC INTEREST

Government activities in the marketplace can be characterized as serving three distinct functions. First, the government regulates the conduct of private enterprises -- as an incident to its power to license, inspect, tax, audit and investigate -- in order to assure compliance with public standards of health, safety and fair business practice. Second, the government directly participates in the marketplace -- as a seller and consumer of goods and services, and as a lender and subsidizer -- to affect the profits and goods and services available to Ontario residents. Third, as a planner, it sets the direction of growth and development in the province to assure a stronger economy and better living standards for its residents.

The very presence of government in the marketplace and the vast sums of public money expended on these activities denote a public purpose. However, at present, accountability for these matters is limited, as most information pertaining to them is shielded from public view. It is the purpose of access legislation to assure greater accountability and openness of government by permitting members of the public to request documents in government files. This in turn would enable the public to more effectively monitor and evaluate the government's

performance of its regulatory, participatory and economic planning activities.

A. Government as a Regulator of the Marketplace

The Ontario government oversees the conduct of an extensive range of business actors in the province. It registers, licenses, and issues permits and other forms of approval for a variety of goods and services in the marketplace. Once approvals have been granted, it ensures continuing compliance with required health, safety and fairness standards by means of inspection, testing, sampling, and investigation. (Although statutes under which regulatory activities are conducted express general standards of compliance and means of enforcement, various ministries follow more detailed guidelines set out in internal manuals. These manuals are for internal government use and are not available to the public.)

Greater access would not only enable the public to better understand the standards of government regulation, it would also familiarize the public with the degrees of compliance expected of those regulated. Present government secrecy facilitates the concealment of error, embarrassment, unfairness and inattention. It is likely that public access would improve the quality and integrity of government regulation, but more important, greater openness could increase public confidence

in the effectiveness of government regulatory activities. It is often said that government regulators are the captives of those they regulate. The first step towards ending this problem, whether it be real or perceived, is by opening the regulatory process to public view.

Government suffers from the inflexibility inherent in any large bureaucratic structure -- once a regulatory scheme is in place, it is often difficult to dismantle. The continuation of these programs may serve various interests. Government employees themselves may have a vested interest in programs once they are established. Greater public access to information about government regulation would encourage more frequent reappraisals of its usefulness and necessity.

Many regulatory schemes are administered by several branches of government due to policy overlap. Here again the problems inherent in large bureaucratic structures are in evidence, for ministries often conduct their related regulatory functions in isolation from each other. This at times precipitates competitiveness between ministries who vie for larger portions of the regulatory pie to assure themselves a stronger and more important position within government. This isolation can also serve the interests of those regulated, by facilitating their ability to divide and conquer. Greater public access might encourage the greater efficiency of regulatory activities and reduce the overall number of government regulators.

B. Government as Participant in the Marketplace

Various branches of government participate more directly in the marketplace. For example, the Ontario Northland Railway provides transportation services in the northern regions of the province. Another Crown corporation, Ontario Hydro, is responsible for the development and distribution of hydroelectric power, and some ministries sell computer time and research results to private interests.

Government is also a large purchaser in the marketplace. All agencies of government employ large labour forces. Some purchase or lease goods, services and land, and solicit tenders for large constructions works and similar undertakings.

Other branches of government work in direct partnership with private business by investing money and time through a variety of assistance programs. For example, the Ontario Development Corporation and the Ministry of Treasury and Economics lend financial assistance to encourage the development of new products and to strengthen faltering business enterprises. Provincial marketing boards aid producers in the distribution of their products, and the Ministry of Industry and Tourism administers a variety of programs which aid the development and marketing of various products in Ontario and abroad.

Direct participation in the marketplace involves government to varying

degrees in activities similar to those routinely conducted by private enterprise. However, the purpose of the government's entrepreneurial activities differs from that of its private counterparts. Government activities are not purely profit-oriented but are intended to serve broader public interests -- the assurance of better quality services, the development of regional employment, and the development of broader distribution of Ontario products.

Access to information pertaining to government participation in the marketplace would facilitate some of the same ends considered in the earlier discussion on regulatory activities. The public would be better able to evaluate the standards used in the awarding of contracts and assistance. For example, in evaluating applications for financial assistance, the Ontario Development Corporation (ODC) follows guidelines set out in an internal document. Public access to this document would permit interested parties to evaluate the standards used in determining who receives assistance. Access to performance guidelines set out in this document would also permit the public to monitor the performance of successful recipients to ensure their compliance with conditions usually attached to these benefits. The public might also benefit from access to evaluation reports, such as those prepared by Ontario Hydro about the performance of companies awarded supply contracts. Greater accessibility would open the success, fairness and propriety of these programs to public scrutiny, ensuring more informed assessments about the importance of these activities and their future development.

C. Government as Planner of the Economy

All regulatory and entrepreneurial activities originate in the course of government's planning and policy function. Once implemented, these activities are frequently reassessed in light of their impact on the economy. Studies are undertaken to determine the effect of existing programs on certain sectors, industries and regions of the province. Recent studies undertaken by the Ministry of Treasury and Economics have examined the impact of liquor and cigarette taxes, the Canada-United States autopact and the mining tax structure.

Reassessment often brings about alterations to existing schemes. The interests underlying government regulatory and entrepreneurial activity are usually conflicting, and change represents a reordering of priorities. For example, a decision to require the use of refillable pop bottles or anti-pollution equipment gives greater priority to environmental concerns than to those of manufacturers and consumers.

The reordering of priorities is not arrived at by government alone. Some access to the policy process is already in evidence. Those most affected by proposed changes actively lobby to make their positions known. Government often solicits business reaction to proposed change. Thus, the reordering of government policy emerges through a process of negotiations between representatives of conflicting interests.

Present access to the economic planning process is uneven. Access

legislation could not only expand the policy process to include a wider spectrum of interests, whose representatives could make their informed views known to planners, it could also encourage governmental decision-makers to be more flexible and responsive to public demands in their reordering of priorities, and to develop alternatives which are evaluated on a clear, objective basis. As a result, the policy process could more accurately reflect the political process by assuring greater accountability to all those governed.

CHAPTER IV

INFORMATION ABOUT GOVERNMENT'S ACTIVITIES IN THE MARKETPLACE AND ITS POTENTIAL USERS

In order to assess the potential benefits of access legislation, it is necessary to examine the nature of government activities and the information generated by them. While this task is inhibited by the sheer size and decentralized nature of government operations, and by the limited availability of record indexing, an attempt has been made in this chapter to identify the types of information maintained by government institutions and the various interest groups and individuals likely to make use of this material if it became available under an access scheme.

Responsibility for regulatory, entrepreneurial and economic planning activities is decentralized throughout the government; for the most part, each ministry collects and manages the information necessary to carry out its functions. Despite the quantity of information amassed by the Ontario government in the course of these activities, there is no comprehensive index to the content of its files. However, a general index to statistical files, the Catalogue of Statistical Files,[1] is prepared annually by the Ministry of

1 Catalogue of Statistical Files in the Ontario Government (Toronto: Ministry of Treasury and Economics, 1977). The catalogue is an internal government document and not available to the public. (cont'd)

Treasury and Economics in conjunction with other ministries. The catalogue contains a very general description of the types of statistical information kept by each ministry, and also indicates whether the information is accessible to the public.[2] There is no similar description of non-statistical information, although most ministries prepare record schedules to provide a record of files which are retained, sent to the Archives, or destroyed. Thus, the primary purpose of this record scheduling is not to detail information currently held in government files, but to record the storage and destruction of files no longer in active use. These record schedules are of little assistance in determining the information maintained by a particular ministry. A single record schedule may describe more than one hundred separate files as "minister's correspondence." Furthermore, the practice in scheduling files and describing their contents varies considerably between ministries.

The following discussion attempts to highlight the range of government activity and the information which pertains to it. Given the enormous reach of government, the selected sampling represents only the tip of the iceberg. It was compiled somewhat at random from the Catalogue of Statistical Files, the record schedules of certain ministries, and

1 (cont'd) However, one may buy a less detailed publication, Index to Statistical Files.

2 The catalogue indicates the extent of present accessibility to the information. There are approximately 23 classifications for present access to these files, such as "strictly confidential," "confidential," "not confidential within government," and "aggregates available." Most of the information listed in the catalogue is not now available to the public.

interviews with officials in those ministries. The randomness of the selection can be attributed to the expansive nature of the subject matter, which does not readily admit to classification.

For the purpose of analysis the discussion is broken down into categories of potential users of information. Although the stated purpose of freedom of information legislation is to facilitate "public" access, it is more accurate to speak of several publics, including environmentalists, conservationists, consumers, labour, investors and private business entities. The examples chosen are representative of the types of information that might be requested by these publics if freedom of information legislation was enacted in Ontario.

A. Environmentalists

Environmentalists might focus on information maintained by government in the course of regulating the conduct of private and government entities to ensure the quality of air, water and other natural resources. These regulatory activities are carried out in accordance with the provisions of numerous provincial statutes; for example, those dealing with the protection of beach properties, endangered species, and the care and preservation

of forests.[3] Information relating to the health and safety of the environment is maintained by several ministries. For example, under The Environmental Assessment Act, 1975[4] and The Environmental Protection Act, 1971,[5] the Ministry of the Environment is responsible for ensuring that the present and future undertakings of private and public institutions comply with environmental standards. The former statute requires public bodies contemplating new undertakings to file an environmental assessment for approval by the ministry before the project commences.[6] This assessment must include information about the amount of anticipated effluent, the proposed treatment, the hardware, and the process by which any contaminant will be eliminated. The preparation of additional reports or further research may be ordered by the ministry before approval is granted.[7] The Environmental Assessment Act, 1975, also requires the filing of a contingency plan within six months of the completion of construction. This plan must outline the instructions to be followed by plan operators in the event of an accident.

The Ministry of the Environment also regulates the contamination caused by the operators of private institutions under The Environmental

3 See for example The Beach Protection Act, R.S.O. 1970, c. 39, as amended by S.O. 1971, c. 50; The Endangered Species Act, 1971, S.O. 1971, c. 52; and The Woodlands Improvement Act, R.S.O. 1970, c. 502.

4 S.O. 1975, c. 69.

5 S.O. 1971, c. 86.

6 Supra note 4, ss. 3, 4. The statute also applies to major commercial undertakings as designated by the regulations.

7 Under s. 7, the assessment must be made available to the public.

Protection Act, 1971, whereby details of a company's plant structure, capacity, process of production, and amount of effluent must be filed with the ministry.[8] In addition to these filings, the statute permits the ministry to conduct further inspections, research and study to determine levels of effluent. Pollution may be remedied under a plan negotiated between a business and the ministry.[9] Another type of information maintained by the Ministry of the Environment concerns technical data on the chemical composition and toxicity of pesticide and herbicide products sold in the province and elsewhere. All exterminators and sellers of pesticides or herbicides in the province are licensed,[10] and the amount of spraying done on land used for animal and plant production is recorded.

Information about the government's own undertakings which affect the environment is held by several ministries. Responsibility for the safety of nuclear installations is shared by both the provincial and federal governments: the inner workings are within

8 Supra, note 5, s. 8.

9 Once the plan is approved by the ministry it must be recorded on an index. Any person may request that a search be made of the index to determine whether a particular name appears on the record: id., s. 19.

10 Id., s. 50.

federal jurisdiction and their external environment and safety is a provincial responsibility. This distinction, however, is one more of principle than fact. For example, files maintained by the Ministry of Consumer and Commercial Relations contain information about the components of nuclear plants and the ratios of certain gasses present in them.[11] More direct responsibility for nuclear wastes and for air quality around nuclear installations is assumed by the Ministry of the Environment and the Ministry of Labour.[12] The latter, for instance, studies the levels of ionizing[13] and non-ionizing radiation,[14] and also monitors the air around nuclear generating stations by analyzing samples of air, water, milk from dairy herds, and solid materials in order to detect leakage of radiation into the environment.

Concerns about the environment merge with issues of health and safety in the workplace, and will be dealt with in more detail in the section of this chapter entitled "Labour."

11 This information is acquired in the course of the Ministry's administration of The Operating Engineers Act, R.S.O. 1970, c. 333.

12 The Ministry of the Environment's jurisdiction derives from The Environmental Assessment Act, 1975, and The Environmental Protection Act, 1971, while the Ministry of Labour gets its authority in this regard from The Occupational Health and Safety Act, 1978.

13 X-rays, uranium and radioactive isotopes.

14 Radiation light, sound, microwaves.

B. Conservationists

Under an access scheme, conservationists might request information pertaining to the soundness and efficiency of natural resource utilization by both private and government entities. Information about the private sector is maintained by several government bodies. The regulation of gas and oil, for example, is shared by the Ministry of Natural Resources, the Ministry of Consumer and Commercial Relations, and the Ontario Energy Board. Under The Petroleum Resources Act,[15] the Ministry of Natural Resources not only licenses oil and gas exploration, but also the equipment used in such endeavours.[16] Those seeking a licence must file a description of the proposed site as well as certain financial data. The ministry also oversees the operation of existing oil and gas wells, such as those on Lake Erie,[17] by requesting drawings and specifications, and monitors their environmental impact through routine inspections.

The Ministry of Consumer and Commercial Relations regulates the appliances used by distributors of natural gas, gasoline and home heating oil.[18] Its jurisdiction overlaps considerably with the

15 S.O. 1971, s. 94.

16 Id., s. 9.

17 Id., s. 3.

18 The Energy Act, 1971, S.O. 1971, c. 44.

Ontario Energy Board's responsibilities for gas storage and pipeline construction. The ministry licenses all sellers and installers of hydrocarbon appliances, and labels and registers all equipment used in the course of distribution. Drawings and specifications of all equipment and appliances used in the underground storage and overland shipment of hydrocarbons must be filed with the ministry. The distributing companies are also required to inspect all installed equipment and report their findings to the ministry. Any accident occurring in the course of distribution must be communicated to the ministry whose inspectors subsequently attend at the site and prepare a detailed report.

The exploitation and sale of timber resources by the private sector is closely regulated by the Ministry of Natural Resources under The Crown Timber Act,[19] The Forestry Act,[20] The Trees Act,[21] and The Woodlands Improvement Act.[22] The cutting, scaling and milling of timber products is licensed and each company must file an annual plan of its cutting operations.[23] The ministry also requests information on the utilization of timber by each mill, and records the transaction volumes and volume of timber harvested on Crown

19 R.S.O. 1970, c. 102.

20 R.S.O. 1970, c. 181.

21 R.S.O. 1970, c. 468.

22 R.S.O. 1970, c. 502.

23 The Crown Timber Act, supra note 19, ss. 3, 26, 45.

land. Pit and quarry operators and commercial fishermen are also licensed by the Ministry of Natural Resources. Under all the above statutes, further information is obtained through the inspection of private property, premises, books and records.

In addition to information acquired in the course of regulating private sector activities, conservationists might also request information about government's own undertakings. For example, Ontario Hydro is a seller of hydroelectricity.[24] It is empowered to purchase any machinery, apparatus, or furnishings to be used in the transmission, distribution, supply or use of power. It carries out investigations and experiments for the generation and distribution of power. In the course of performing these activities, Ontario Hydro relies heavily on the private sector for the development and construction of large undertakings necessary to maintain the energy supply. Before awarding contracts, Ontario Hydro must compare rival technologies and weigh the strengths and weaknesses of the companies promoting them. Before approving tenders, Ontario Hydro examines every aspect of the tendering company's operations to assure the soundness and safety of the construction process. Within sixty days of a contract award, a successful bidder must submit information on its welding and manufacturing processes, its quality assurance system and its inspection plans. Ontario Hydro employs inspectors who monitor companies supplying goods, and quality assurance inspectors who complete evaluation reports of company

24 The Power Corporation Act, R.S.O. 1970, c. 354.

performance. In addition, as one of the largest suppliers of energy to the private sector, Ontario Hydro maintains detailed information about the energy use of its customers.

Further information about private sector energy use is held by the Ministry of Industry and Tourism. Under a program designed to assist the private sector in reducing energy costs, the ministry operates an energy bus which visits plants and factories throughout the province. In the course of operating this program, the ministry gathers and records the details of various business energy requirements.[25]

Conservationists might also request information generated in the course of policy and planning for resource utilization, conducted by several ministries. For example, the Ministry of Natural Resources undertakes special investigations into various areas of public concern, such as the oil crisis. Information used in a study of this issue was based on material held by the ministry about the existing reserves of each oil company in the province.[26] Data concerning the

25 The Ministry of Treasury and Economics also maintains information on the energy use of the private sector. Some of this is made available to the public in aggregated form, such as the study "Consumption of Fuel and Electricity by Ontario Manufacturing Industries."

26 The results of these studies are published in aggregate form and do not include reserves of particular companies.

productivity and profitability of each mining and forestry operation, used to evaluate present policies of natural resource utilization,[27] are also maintained by the Ministry of Natural Resources.

It should be noted that some of the information listed above would also interest environmentalists, as their concerns closely relate to those of conservationists, and often overlap.

C. Consumers of Goods and Services

Consumer interests would focus on information pertaining to the quality and price of goods and services in the marketplace. While some jurisdiction over these matters is federal -- for example, the testing of hazardous products before they are placed on the market -- the province regulates certain products and services to ensure that they are safely and fairly offered to the buying public of Ontario. In an attempt to ensure compliance with fair standards of business practice, the Ministry of Consumer and Commercial Relations regulates a wide range of commercial activity. All mortgage holders, real estate and business brokers, travel agents, itinerant sellers, motor vehicle dealers, collection agencies and sellers of upholstered and

27 For example, the ministry requests that companies respond to questionnaires in annual surveys of smelters, mill concentrators and mining operators. See discussions of census filings, infra.

stuffed articles must be registered with the ministry.[28] These registrations must be renewed annually. Registrants evidencing poor past performance or who have prompted consumer complaints are further inspected and investigated.[29]

Other commercial activities are regulated by licensing requirements. For example, the Ministry of Agriculture licenses and routinely tests the products of all vendors, processors and distributors of milk and margarine products. The Ministry of Consumer and Commercial Relations licenses cinema and racetrack owners as well as restaurants selling alcoholic beverages, the latter through the Liquor Licensing Board. Tourist operators are licensed by the Ministry of Industry and Tourism, and nursing homes by the Ministry of Health. Licensing procedures are essentially the same, and consumers might request information used in granting a licence, the contents of inspection and investigation reports, and the nature and numbers of complaints filed against a particular licence holder.

28 See, for example, The Collection Agencies Act, R.S.O. 1970, c. 71; The Motor Vehicle Dealers Act, R.S.O. 1970, c. 475; and The Real Estate and Business Brokers Act, R.S.O. 1970, c. 401.

29 Statistical compilations of complaints filed against particular businesses are kept by the ministry but are not released to the public. However the ministry does prepare various booklets from time to time in an effort to inform the public of unfair practices.

Consumer groups might also request information pertaining to the pricing of products and services. The pricing decisions of private business are determined by the play of market forces which affect the demand for a product and the cost of producing it. Such detailed costing information is maintained by several ministries.

Government is placed more directly at the centre of pricing decisions through provincial marketing boards. In administering these boards, the government is in partnership with private entities and is thus a direct participant in the selling of products. Marketing boards established under joint federal and provincial schemes regulate the production and distribution of agricultural products such as eggs, chickens, tobacco and milk.[30] Boards set quotas for the production of these commodities, purchase the produced allotment directly from the farmer, and in turn, sell the product to manufacturers, processors and distributors. In the case of milk marketing, the price paid to the Milk Marketing Board depends on the final product sold. To ensure a fair price, he Ministry of Agriculture licenses and audits processors who buy from the land.[31]

Policies having a direct effect on the prices of goods and services are developed by various government ministries. Any policy decision resulting in added expenditures for the private sector has a direct effect on the prices paid by consumers. These issues of considerable concern to business are discussed in more detail later in this chapter.

30 The Farm Products Marketing Act, R.S.O. 1970, c. 162.

31 The Milk Act, R.S.O. 1970, c. 273.

D. Labour

Labour groups might display particular interest in information about occupational health and safety, wages and benefits, and business planning. Plant safety and the quality of the work environment have been part of an important and growing area of labour concern. Several government ministries administer these matters. For example, the Ministry of Labour regulates the safety of proposed and existing industrial buildings.[32] Drawings of proposed plant facilities are filed with the ministry, and approval is granted after an examination of safety measures is completed. In addition, routine inspections are conducted after a facility has been constructed in an attempt to ensure plant safety. If failures to comply with regulations governing plant safety are found in the course of inspection, the company is directed to make the necessary corrections.[33]

Another occupational health and safety concern, the monitoring of radiation in mines, is undertaken by the Ministry of Labour in conjunction with the Ministry of Natural Resources whereby mining companies are required to record workers' exposure to radiation. In conjunction with the Ministry of Health, the Ministry of Labour monitors X-ray installations for commercial and veterinary use. Plans for installations are reviewed and equipment is inspected on a periodic basis or when a particular problem arises.

32 Under The Occupational Health and Safety Act, 1978, S.O. 1978, c. 83.

33 Id., s. 29(6).

Investigations in areas of special concern are conducted by the Occupational Health Branch of the Ministry of Labour. Battery plants, lead refineries and brass foundries are visited. Industries using cadmium, mercury and lead, or plants exposing workers to asbestos or silica dust are closely monitored. In the course of these investigations, detailed medical reports are compiled about industrial workers, including blood and urine samples, X-rays and other medical testing.[34] The ministry also prepares an air quality assessment report, which informs a company of the remedial work necessary to bring the company within acceptable guidelines. In addition, statistical studies in particular areas of health concern[35] -- examining the safe levels of uranium, nickel, asbestos, vinyl chloride, arsenic and pesticides -- are currently in progress or completed.

Labour would have an interest in information pertaining to wage scales and benefits of private enterprise. This data is

34 These reports are not released to anyone including the employee's family doctor. A less detailed report of work conditions, chemical exposures and the general health of the employees is given to the company.

35 The studies are made available in aggregate form but levels of toxic substances found in particular companies' premises are not disclosed. The ministry also conducts studies on manpower and wage structures in the province. These studies, such as "A Manpower Survey of the Food Processing Industry in Ontario, 1975" and "A Survey of the Construction Industry, 1978," are based on detailed questionnaires which are filed by the members of the particular industry. The results are published, but again, in aggregate form.

maintained by several ministries of government. For example, under The Employment Standards Act, 1974,[36] the Ministry of Labour regulates the payment of minimum wages and benefits such as pregnancy leave, overtime and holiday pay. In response to employee complaints, the ministry dispatches field investigators to examine the merits of a complaint. A settlement may be imposed on a company failing to comply with the statute. In the course of these activities, the ministry becomes familiar with wage scales throughout the province. Further, both the Ministry of Labour and the Ministry of Treasury and Economics maintain comprehensive information on wages and benefits received by various elements of the work force.[37] Some of this information, filed annually with Statistics Canada by each business in the province, is remitted back to the provincial ministries. Labour groups might request additional financial information concerning their employers, in order to strengthen their bargaining position for wages and benefits.

Labour might also request information maintained by numerous ministries indicating the future direction of business activity. The following examples of projected plant shutdowns and relocations given by the Ministry of Treasury and Economics are illustrative. A yacht manufacturer, in the process of considering a shutdown of its Ontario operations and expansion of its U.S. plant facilities, sought the ministry's assistance in its efforts to convince the federal

36 The Employment Standards Act, 1974, S.O. 1974, c. 112.

37 See infra.

government that a reduction of tariffs on materials used in the manufacturing of its product was essential to its competitiveness in the U.S. market. A large producer of power tools facing serious financial difficulties and almost forced to close its doors, was given financial assistance through the intervention of the provincial ministry and its federal counterpart in an effort to maintain regional employment levels. Financial assistance was also granted by the ministry through the ODC to encourage a large company in the automotive industry to construct a new plant in one region of the province, rather than expand an existing facility located elsewhere.

E. Investors

Investors and creditors are now assured of some access to information which is required to be disclosed under the laws of Ontario. However, these statutory disclosures are typically very general in nature and it is likely that investors would request more timely and detailed information were it made available under a freedom of information statute. Further, since most disclosures (such as the annual financial statement required of public companies) reflect past performance, and although investors rely in part on past performance, their decisions are often based on speculation and projections about future planning. By examining more thoroughly information maintained by several ministries, investors might be able to extract a

detailed and up-to-date profile of business performance. Such a profile could include information about profitability, solvency, the soundness of management and the labour force.

Information contained in tax returns filed with the Ministry of Revenue would provide investors with a much clearer picture of past performance than is currently available in annual reports. These reports, which are required of all public companies and larger private companies, are prepared on a consolidated basis. Whereas large conglomerates with diverse corporate holdings and multiple product lines are permitted to submerge the profitability of each of their business operations in consolidated financial statements, tax returns filed on a company-by-company basis might closely approximate profits by line of business. They could also provide clearer insight into the patterns of investment in stocks and bonds, the types and conditions of fixed assets and the rates of borrowing. Additional information about profitability and sales could be gleaned from other tax and census filings which are scattered throughout several ministries of government.[38]

In its capacity as a lender of financial[39] and other forms of assistance,[40] the government routinely assesses business performance

38 See infra.

39 Through the Ontario Development Corporation under The Development Corporations Act, 1973, S.O. 1973, c. 84. The only information made public by the ODC is an annual report which describes the amount of financial assistance received by companies for a given year.

40 Such as under The Ministry of Tourism Act, 1972, S.O. 1972, c. 5, s. 4.

on a continuing basis. This assessment is based on regular filing and frequent inspections of companies receiving assistance. Similar detailed assessments of business performance are conducted by the government in its role as purchaser and licensor. As purchaser, the government makes these assessments before and after contracts are awarded: the work of successful bidders is routinely approved in evaluation reports and companies who fail to meet required standards are placed on blacklists. As licensor, the government frequently assesses businesses through inspection and investigation reports which are required as a condition before licences are issued.

As mentioned earlier, investor confidence to a large degree is generated by indications of future performance. The risk taken by investors is directly related to the amount of information available to them. The government is a repository of two distinct types of information which would give investors greater insight into future conduct and performance of business actors: information about projected planning and information about government policy.

First, information about future activities is acquired by the Ontario government directly from the business itself -- either pursuant to statutory requirement or on a voluntary basis. For example, the Ministry of Natural Resources is aware of all new mining and mineral exploration. This ministry, as well as the Ministry of the Environment, would know of any proposed expansions or changeover in mining and steel operations. The Ministry of Agriculture is privy to

information about increased production and processing of agricultural products. Information about proposed industrial expansion or new plant facilities would be gleaned through the regulation, by various ministries, of zoning, building permits and approvals of plant safety. Further, detailed information about new products being considered for distribution or use is maintained by the various ministries responsible for their regulation. Finally, apart from specific regulatory schemes, the government often requests information from the private sector about future planning. For example, the Ministry of Treasury and Economics asks 200 of Ontario's largest corporations (which account for over fifty-five percent of all sales and employment in the province) to respond to a questionnaire entitled "The Ontario Corporations Survey." Data requested includes items such as planned capital expenditures, expected net income before profits, inventory turnover, and anticipated amount of tax to be paid in the following year.

The second type of information about future planning concerns new government policies or decisions which may have an impact on company performance. For example, government decisions requiring business to minimize pollution of the environment and reduce employee exposure to certain chemicals may have an adverse effect on profits. On the other hand, decisions to lend financial assistance, lower tariffs, award large contracts and provide new tax incentives may have a beneficial effect. Any advance indication of government policies which might be more readily available under an access scheme would likely be requested by the investing community.

F. Business Interests

The American experience with freedom of information legislation indicates that many of the requests for information pertaining to government's role in the marketplace have been made by private enterprise. While business has demonstrated an interest in information about the internal practices of government and the planning process, the legislation has been of greater use to business as a vehicle for strategic intelligence about the internal operations of its competitors.

1. Government Internal Practices and Policy Formulation

Business has a very direct interest in the nature of government's regulatory, participatory and planning operations. Access by business could provide greater assurance that government activities are conducted in a more consistent manner across companies within an industry group. Access to internal inspection manuals, for example, would reveal whether inspection and enforcement practices are uniform throughout the industry or whether there is preferential treatment. Similarly, documents containing guidelines for audits and investigations and for awards of contracts, assistance and other approvals might be of interest to business. Moreover, business interests would extend to information about their own operations, which is currently unavailable. As indicated earlier in this chapter,

numerous assessments of business performance and conduct are prepared by the government of Ontario. These include evaluative reports on contract performance (by Ontario Hydro), inspection reports containing the results of medical tests on employees exposed to hazardous materials, assessments of companies receiving financial assistance, and tax audits.

Given the enormous impact of government policies on the private sector, business would likely seek information about planning in its formative stages. Access to this type of information could permit business to have a more substantial impact on decision-making, and could lead to a better understanding of the process. Although there is currently some degree of access by the business community to the decision-making process, the private sector frequently finds itself reacting after government pronouncements are made. Furthermore, by establishing a set of procedural rules governing access, legislation would reduce the present use of discretion which may result in uneven or preferential access.

2. Competitors

Government presently maintains a storehouse of financial, technical and commercial information which details the internal operations of various business enterprises. It would be difficult to list the types of information that businesses might request about competitors,

as this would depend on the nature of each business operation, products, and the markets within which it competes -- factors which have a direct bearing on the degree of knowledge currently available in the industry. Those business entities considering entry into a market will be interested in the products, processes, profits and strategies of those already in the market. Those already in the market will be interested in potential entrants as well as existing competitors. It can generally be said, however, that an access scheme would provide a fertile source of information for business to acquire an even greater understanding of how competitors maintain their advantage in the marketplace and their future strategies to increase it. Numerous examples of competitively valuable information can be found in preceding sections of this chapter; information of interest to investors and consumers, in particular, is likely to be important to business competitors as well.

Business performance can be gauged by financial information. The most comprehensive documents on costing and sales maintained by government are entitled the "Census of Manufacturers," the "Census of Mining Operations," and the "Census of Logging Operations." By examining these documents a business could learn about its competitors' unit costs of production, pricing policies, and its gross revenues by type of product. The "Census of Manufacturers," for example, is broken down into two parts. The first part, dealing

with the input or cost side of the manufacturing process, classifies manufacturing inputs under inventories at various stages -- unfilled orders, consumption of fuel by type of fuel, raw materials including components and repairs, and supplies -- and non-manufacturing inputs under costs of merchandising, new construction and the like. The first part of the census form also includes some general information about the cost of labour. The second part deals with outputs or value of goods sold, breaking down manufacturing outputs by type of product and non-manufacturing outputs by revenues from lease of new equipment, rental property, value of new construction, and machinery.

Additional financial information of interest to business competitors can be found in various ministries of the government. Corporate tax returns filed with the Ministry of Revenue would indicate the class and age of a competitor's equipment, the securities it held and the source and rate of its borrowing. The Ministry of Industry and Tourism and the Ontario Development Corporation (ODC) also acquire, on a continuing basis, detailed financial information about the companies they assist; for example, the ODC requires loan recipients to submit financial statements every six months, and also conducts regular inspections to examine a company's bookkeeping, costing, inventory control and cash flow. The Financial Institutions Branch of the Ministry of Consumer and Commercial Relations collects financial information from provincially-incorporated insurance companies, who are requested to file an annual return. While most of this information is published in annual reports prepared by the branch and broken down on

a company-by-company basis, information concerning the assets of the company, the dividends it receives, its solvency and reinsurance are not included in the report.

In the course of licensing and tendering, further financial information is acquired from business. Financial statements must frequently be submitted for licence approvals and annual renewals, and the solvency of businesses responding to tenders is examined before contracts are awarded.

In certain markets, access to a competitor's costs of production would enable a business to determine the methods by which the goods were produced. As mentioned earlier, financial data might reveal how efficiently a competitor utilizes his plant, equipment, labour and raw materials. Although insight into the technical aspects of a competitor's operations may be gleaned from financial data, business interests could request more detailed accounts of the methods of production from various government institutions if information access legislation were in place.

As with financial information, the type of technical information collected by government varies from one industry to another. While sellers of primary products such as oil, lumber and steel are usually aware of the composition of their competitors' products, the formulae and processes used in more complex products, such as chemicals and plastics, are less likely to be widely known.

Various ministries maintain information about product composition and design. Some of this data is acquired in the course of tendering. For example, companies seeking contracts for road paint submit information about the chemical composition of their products to the Ministry of Transportation and Communications, and companies vying for government printing contracts are asked to supply information about the nature and efficiency of their printing equipment. Design specifications of various types of equipment submitted to government as a condition of approval include elevators, pressure vessels, gas storage tanks, anti-pollution hardware, and oil and gas rigs.

Additional information about the nature and utilization of plant facilities, equipment, and the labour force are maintained by several ministries. The facilities of those receiving licences and other forms of approval, monetary assistance and contract awards are subject to inspections as a condition of these benefits. The list is long and includes mining, forestry and dairy operations, and distributors of hydrocarbons. In the course of inspection, various aspects of the undertaking, equipment and labour force are examined, and the details are held in government files.

The financial and technical information discussed to this point would indicate the methods by which a competitor has maintained its competitive advantage. However, as indicated earlier, the value of business access to a competitor's past history is problematic. Although a study of past patterns may yield some insight into planning, business would probably display an even greater interest in

information reflecting the future intention of its competitors. A number of government bodies maintain information about the future direction of various businesses in the province. New technology and products are freqently disclosed to government as they are brought to a particular ministry's attention for tentative approval long before they are utilized by the private sector. For example, the Ministry of Consumer and Commercial Relations has information pertaining to an electronic signalling device used in the bottom loading of oil tankers, as well as a sensory device used for the early detection of underground oil leaks. In addition, a new gasoline product was discussed with ministry officials months before it was introduced on the market in order to assure the safety of its composition and to enable the company to changeover to the new product in its storage tanks before an announcement was officially made to the public.

Under an access scheme, business competitors might request financial projections which are acquired by various government institutions in the course of administration and regulation. For example, companies receiving export capability assistance from the Ministry of Industry and Tourism must give twelve-month performance forecasts, and three- to five-year projections are required from insurance companies. The Ontario Securities Commission receives detailed financial projections of corporate performance. While such information is filed routinely, the

government also acquires this type of data on an ad hoc basis. In the course of tax changes, for instance, companies lobby on their own behalf using projections as to how a particular proposal might affect the financial performance of their company.

CHAPTER V

SECRECY IN THE MARKETPLACE

The object of freedom of information legislation is to provide public access to government records. The only limitations placed on this general principle of access are governed by the potential harm which may result if present secrecy were not preserved. The discussion now turns to the nature of existing secrecy and the interests that underlie it.

The present secrecy accorded by government to information about its activities in the marketplace is rooted in a number of different factors. It stems in part from the unique characteristics of information[1] and its importance to competitive advantage in the private economy. Secrecy is the major vehicle through which the fruits of knowledge are withheld from rival organizations. Indeed, John Kenneth Galbraith regards

1 Economists have only recently begun to examine the impact of information on the marketplace. Some of the more significant research papers are: Alchian, "Information Costs, Pricing and Resource Unemployment" (1969) 7 W. Econ. J. 109; Arrow, "Economic Welfare and the Allocation of Resources for Invention," in National Business and Economic Research, The Role and Direction of Inventive Activity, Economic and Social Factors (1962) 609-25; Demsetz, "Information and Efficiency: Another Viewpoint" (1969) 12 J. L. & Econ. 1; Stigler, "The Economics of Regulation" (1961) 69 J. Pol. Econ. 213.

control over information as the sine qua non of modern industrial organization.[2] Private business entities go to great lengths to preserve informational assets, and many expend vast sums on elaborate security systems. Suppliers and customers are often required to sign secrecy agreements to ensure that information is kept away from competitors. Negotiations for licensing arrangements are conducted in strict confidence, and contracts of employment will often specify that information acquired in the course of employment cannot be divulged or exploited.

Economists differ on the impact of business secrecy in the marketplace. Certain neoclassical economists claim that information should not be artificially protected by laws of secrecy but disseminated to the fullest degree possible throughout the marketplace. The free flow of information is viewed as essential to a competitive marketplace, for only by eliminating uncertainty and equipping consumers and producers with knowledge for rational decision-making can an efficient allocation of resources take place.[3]

2 Galbraith, The New Industrial State (Boston: Houghton Mifflin, 1967) 23-24.

3 For comments on the competitive importance of information see the United States Federal Trade Commission Staff Report, "Economic Report on Corporate Mergers" (1969) and the articles referred to in note 1, supra. For discussions of the broader social and political implications of corporate secrecy see Drucker, The New Society: the Anatomy of Industrial Order (New York: Harper & Bros., 1949); Miller, "Private Governments and the Constitution, in Hacker, ed., The Corporate Take-Over (New York: Doubleday Anchor Books, 1965); and Dahl, After the Revolution: Authority in a Good Society (New Haven: Yale University Press, 1970).

The idea that the performance of a market can be improved if there is broad dissemination of information can be traced to Adam Smith's model of pure competition. This model assumes that competitive exploitation of information will tend to produce multiple sources of supply, the lowest cost for consumers and the most widespread use and exploitation of information.[4] The successful idea with its attendant high profits would be subject to a greater competition through the normal play of market forces. Thus, broader dissemination of information would assure its more efficient utilization and would encourage greater competition in the marketplace.[5]

On the other hand, those who oppose full dissemination[6] of information claim that the benefits presumed to arise from disclosure rest on a number of assumptions about the structure of the economy that are inaccurate. Among these assumptions are an industry structure characterized by many different suppliers of a single homogeneous product, with none of these firms large enough to influence aggregate

4 See Zeckhauser, "Uncertainty and the Need for Collective Action," in Haveman and Margolis, eds., Public Expenditures and Policy Analysis (Chicago: Rand-McNally, 1970) 96, where the author summarizes the importance of information to the neoclassical economist: "The neoclassical model of perfect competition requires perfect knowledge. The presence of uncertainty, a lack of knowledge of which state of nature will obtain makes the model imperfect." In the neoclassical model, perfect competition and perfect knowledge are treated as given.

5 See Arrow, "Economic Welfare and the Allocation of Resources for Invention," supra, note 1.

6 See Demsetz, supra, note 1.

industry output and price. All of these firms, the supposition goes, serve a diverse number of purchasers and none of these purchasers have any degree of influence over the aggregate quantities demanded in the marketplace and the resulting price levels. However few markets today resemble the theoretical model of pure competition. Indeed, many are characterized by few competitors and few purchasers. Those who oppose dissemination claim that in oligopolistic markets it may reduce uncertainty and thereby increase tacit coordination or conscious parallelism among competitors. In markets characterized by one large competitor and few small ones, greater dissemination of information may work to the benefit of larger interests who are best able to use the information.

Furthermore, economists who oppose broad dissemination of information claim that by harming particular competitors, the development of new ideas in the marketplace would be adversely affected. The cost of creating new ideas is often high, thus dissemination may act as a disincentive for future development. Only through secrecy are developers of new ideas able to appropriate information, maintain its value, and reap the profits necessary to generate the incentive for its future production. Consequently, in order for information to be disseminated for value through the marketplace, like any other commodity its value must be preserved by maintaining scarcity through secrecy.[7]

7 Id. The author criticizes the suggestion made by Arrow in "Economic Welfare and the Allocation of Resources for Invention," supra note 1, that the need for secrecy could be avoided if government were to undertake the responsibility for the production of knowledge or at least all research and development efforts.

Although economists differ about the impact of secrecy on competition in general, they agree about its importance to competitors in particular. The importance of secrecy to competitors is based on certain unique characteristics of information which differ from those of other commodities in the marketplace. At any point in time, there is a competitive equilibrium based on the distribution of ownership of assets and skills commanding a certain price in the marketplace. Few purchasers are conscious that information is sold in the marketplace and that there is a demand for it comparable to that for other goods and resources. However, most economists view information as an asset whose value to those who develop and possess it, like any other asset, is based on its scarcity. Unlike other assets, though, information operates free from the normal economic constraints of scarcity. A wrist watch, for example, can be worn by only one person. Other scarce resources must be used in order to produce additional watches for a second, third and greater numbers of persons to wear. However, information about time in general may be shared simultaneously by many. Once produced, information in the form of ideas, knowhow, designs and formulas can be repeatedly used and copied.[8] Although information may be embodied in tangible forms, such as books or records, for the purposes of exploitation, the idea is the intangible asset which underlies the final tangible product. This intangible aspect of information makes it difficult to appropriate to "owners."

8 This characteristic of information has been discussed by various authors. See Musgrave and Musgrave, Public Finance in Theory and Practice (New York: McGraw Hill, 1973).

These two unique characteristics underlie business secrecy. Through secrecy, information can be appropriated by "owners" and maintained as a scarce and therefore valuable asset in the marketplace. When information is freely disseminated, the competitive advantage to be realized by maintaining its scarcity and exclusivity disappears. The loss of an informational asset, like the loss of any other asset, results in competitive harm.

Recognition of exclusivity over informational assets could be achieved by recognizing information as "property."[9] Although legal rules and principles rarely depart from the notion that property rights attach only to tangible property such as chattels and land, certain limited types of information are recognized as the property of those who invent or conceive them -- under federal schemes governing patentable trademarks, industrial designs and copyright material. Under these statutes, ideas of a novel intellectual nature are segregated from other information into a class of "industrial property."[10] By patenting an invention, an inventor is granted the same rights enjoyed

9 See Note, "Developments - Competitive Torts" (1964), 77 Harv. L. Rev. 888.

10 Id., 932. The author states the rationale for this "property": "... if the author cannot limit the performance of his symphony once a score appears publicly, he cannot charge the orchestra, recording company or radio station for the use of his intangible creation ... Since the supply of the product, once created and made available, is naturally unlimited. The supply must be legally limited or the demand for the product no matter how great may never produce a profit from the intangible."

by the owners of tangible property; he is protected against infringement of those rights by others for a specified period of time in the jurisdiction where the patent was granted. However, in return for the monopoly ownership in the idea, the patentee must publicly register it in order to ensure its widespread and effective dissemination.[11] Here is a clear legislative attempt to balance the need for public access to information against the need for an incentive to those who create it.

The benefits of exclusivity, however, are not always a sufficient incentive to outweigh the disadvantages of full disclosure. Patent protection is most desirable for products that are easily exposed in the marketplace. Since product composition and machinery structure are often easily reverse-processed by competitors, an inventor often agrees to disclose what would ultimately become evident rather than lose all right to reap some profit from the idea. In the case of more complex manufacturing processes less apt to be exposed in the course of distributing a product, an inventor may feel that he would reap higher profits over a longer time by keeping the information out of the public domain.

Most commercially valuable information does not qualify for legal protection as industrial property. The reluctance to grant property

11 Thus, the idea is made available to anyone who cares to enter the patent office. It is only the right to exploit the information which is controlled.

or monopoly rights in information is not surprising. As mentioned earlier, information is distinct from other assets. It is intangible and can be subject to multiple use without loss to its originator. Since an originator cannot be said to have lost his property, it is difficult to determine if there has been an infringement of property rights until subsequent use by others is evidenced. Furthermore, a subsequent user may have arrived at the idea independently and not appropriated it from anyone. A soft drink manufacturer is protected by law against theft of its syrup, but once the product is on the market the formula is open to public view and therefore open to anyone to discover it.

The law will enforce the right to maintain exclusivity through secrecy only when the information's use or communication represents an unfair trade practice. In industrial matters, this is known as trade secret protection,[12] and arises when an individual transfers information to

12 "Trade secrecy" as it is described in industrial matters is part of a wider doctrine of law known as breach of confidence. The law of trade secrets in Canada is not particularly well developed. The most comprehensive discussion of the law is found in Fox, Canadian Law of Trademarks and Unfair Competition (Toronto: Carswell, 1972) 652-67. However, there has been a growing interest in the law of confidence in recent years. For discussions of trade secrecy as viewed in the broader context of the law of confidence, see Prothoe, "Misuse of Confidential Information" (1978), 16 Alta. L. Rev. 266; Wright, "Confidentially Speaking: Equity in Industrial Property Matters" (1975) 16 Can. Pat. Rep. 53; Ricketson, "Confidential Information: A New Property Right" (1977) 11 Melb. U.L. Rev. 223; Boyle, "Confidence and Privilege" (1974) 25 N. Ireland L.Q. 31; Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 56 L.Q. Rev. 463.

another on the clear understanding that it be kept secret and the party who receives the information breaches that confidence. This doctrine grants no proprietary rights in information; it merely attempts to redress the loss occasioned by someone's wrongful use by permitting a claim for damages.

The most widely used definition of trade secrecy is found in the American Restatement of Torts:

> A trade secret may consist of any formula, pattern, device or compilation of scientific, technical or commercial information which the trade secret owner has taken the reasonable precautions to maintain in secrecy so that except by improper means there would be difficulty in acquiring it, and which gives the said owner an opportunity to obtain advantage over others who do not know or use it. 13

The Restatement further defines the concept by describing the types of information that would be excluded from trade secret protection:

> Information as to a single or ephemeral event in the conduct of the business, for example, the amount or other terms of a secret bid for a contract, or the salary of certain employees or the security of investments made or contemplated, or the date fixed for the announcement of a new policy or for the bringing of a new model or the like. 14

13 American Law Institute, Restatement of Torts (Philadelphia: American Law Institute, 1939) s. 759 Comment (a). For a comparison of the Canadian and American approaches, see Fridman, "Protection of Business Relations by the Law of Torts" in Fridman, ed., Studies in Canadian Business Law (Toronto: Butterworths, 1971) 469.

14 Id.

While this definition helps to characterize trade secrets in a general way, the concept of a trade secret is not clearly defined. To say that an idea constitutes a trade secret is simply to say that its secrecy and competitive value is protected from wrongful appropriation. Therefore, no specific class of information would be characterized as a trade secret because of its inherent qualities. The types of information included in the Restatement, those commonly viewed as competitively valuable in most markets, are merely illustrative of the general principle that the competitive harm occasioned by wrongful use or dissemination will in certain circumstances be redressed by the law.

The competitive harm which results from disclosure in the marketplace is recognized both by economists and the law. Of primary concern in this paper is the potential harm that might result from broader dissemination of information pertaining to government's activities in the marketplace under freedom of information legislation. Broader public access to this information poses the threat of competitive harm to three identifiable interests: private enterprises, government business enterprises, and the economy as a whole.

CHAPTER VI

THE IMPACT OF FREEDOM OF INFORMATION LEGISLATION

A. The Private Sector: Competitive Harm

In an attempt to assess the possible impact of public access legislation on the private sector, interviews were conducted with representatives of twenty businesses in the province. Most businessmen interviewed agreed that access legislation could provide a greater insight into government's internal practices and decision-making processes which would be useful in the course of their dealings with government.

Although it was suggested that access legislation might permit interested parties to request information about their competitors, little if any interest was shown by those interviewed in the positive implications of access to a competitor's operations. Only one interviewee stated that the benefits of access to information about competitors might work to his company's positive advantage, because it was large, diversified, and had greater resources at its disposal to effectively obtain and use the information. All others interviewed displayed a strong resistance to the disclosure of information relating to their company's own internal operations. This resistance was based on their concern about the harm that might occur to their

operations from the disclosure of sensitive information which had either been collected or generated by government. There was, however, considerable variation in the types of information perceived most sensitive. This can be attributed in part to the differences in products sold, the competitiveness of markets and the present availability of information in a given industry.

All company representatives stated that the disclosure of financial information which they had filed with government would have an adverse effect on their business performance. Their concern was not only about disclosures to competitors and potential competitors, but to other business actors with whom they dealt, such as suppliers, customers, employees and creditors.

As far as competitors were concerned, details of where and how high profits are earned in certain product lines and regions might encourage them to challenge a company's success by stepping up operations to share in those profits. High profits might also encourage new entrants into the market. Moreover, pricing policies used to gain profit are reflected in costing information.

Although the concern about specific types of costing data varied, most companies regarded information about unit costs as sensitive. Several potential harms were cited as likely to arise with the disclosure of other specific types of costing information. In some major resource industries, disclosure of a company's large inventories might be met with a competitor's efforts to drive prices down. Companies with large

numbers of unfilled orders might, in competitive markets, lose customers to eager competitors. The disclosure of salaries paid to executives might result in competitors' efforts to lure away key personnel.

Concern was also expressed about the possible impact of financial disclosure on other business relationships. For example, the disclosure of a company's financial position might jeopardize its bargaining position with suppliers and customers. Detailed financial information would be a powerful tool in the hands of labour, and access to this information might precipitate strikes and labour unrest. Finally, creditors could be unwilling to extend credit or could request early repayment of outstanding loans if a company's poor financial condition were disclosed.

In addition to the disclosure of financial information, most companies felt that some technical and other commercial information submitted to government was of a highly sensitive nature and would harm their competitive position if disclosed. Again, as with financial information, resistance to particular disclosures varied with the nature of the product and the existing knowledge in the market. For example, a hosiery company and an electronics company expressed concern about competitors' access to information about their plant facilities and machinery. Each claimed that plant facilities were designed and machinery tooled in a unique way unknown to competitors. In industries such as steel and paper, where the nature of the product, the plant

facilities and the processes are generally known, businessmen expressed resistance to greater access to information about methods of plant utilization by product line and production efficiency. A steel company executive stated that although its machinery and equipment would be known to competitors, information about yield from poured steel to a bar product would indicate the amount of wasted steel and the efficiency of the process. Opposition was also expressed to the disclosure of information about improvements in efficiency and cost reductions brought about at the company's expense. Since steel companies are continually striving to increase efficiency by reducing coke ratios, information about successes in this area would be of particular interest to competitors. A similar view was expressed by a representative of a medium-sized lithograph company, who indicated that although information about machinery and processes would generally be available to competitors, information pertaining to machinery utilization and production capacity would be sensitive.

Considerable concern was voiced about the disclosure of technical information pertaining to product design and composition. For instance, a small manufacturer of electronics stated that the composition of his products, used in street lighting, was unknown to competitors. He claimed that if his competitors, all large companies, were permitted to gain the necessary information to enter the market, his operations would collapse. Another company executive stated that access by competitors to design specifications filed with Ontario Hydro would deprive his firm of exclusive rights to sell newly developed technology.

A manufacturer of unpatented environment control systems was concerned that competitors gaining access to his company's designs could copy and market these systems at a price which did not have to account for the costs of innovation.

As indicated earlier, much of what is filed with government reflects a company's future planning. Most companies interviewed considered this information to be of great strategic importance and therefore very sensitive. Pricing and marketing strategies depend on timing. One company representative stated that being the first to bring a new product onto the market assisted his company in obtaining a larger share of the market. If the government had released the information it was given about the planned introduction of the product, a competitor would have been encouraged to introduce its own product, and any competitive advantage could have been lost. A large paper manufacturer expressed concern about competitors' access to the detailed projections it files on capital expenditures and production for each plant. A company receiving assistance from the ODC and the Ministry of Tourism was concerned about competitors' access to projections of expected production profits and employment, which are filed annually. In addition, companies filing information about their future profits and capital expenditures in the Ontario Corporations Survey were concerned about telegraphing corporate planning, as it would enable competitors to appropriate their business advantages.

In addition to providing strategic information to competitors,

disclosures relating to future planning might also affect a company's dealings with other business actors. For example, shareholders might request an explanation of a corporation's failure to meet expected projections; labour might bargain with these projections in mind, as might suppliers and customers.

Two additional concerns mentioned by interviewees relate to businesses operating extra-provincially. The first involves companies that operate in foreign markets or that are exposed to foreign competition in Ontario. These business entities expressed the strongest concern about the impact of access on their operations. Although foreign competitors could use the legislation to their strategic advantage, their operations would be shielded from similar exposure. This differential in information access could place Ontario companies at a considerable disadvantage. Furthermore, Ontario businesses licensed by foreign companies worried that disclosure might jeopardize future licensing arrangements.

The second concern has important political implications. Corporate decisions to locate, shut down, or relocate operations in one region of the province are presumably based on market forces which dictate where the greatest efficiency and profit maximization can be realized. Access to details surrounding a plant's location would ultimately force a company to justify and debate sound business decisions in a political forum. For example, access to details of a shutdown would permit workers and residents to scrutinize the decision and dispute it as a matter of regional unfairness. Several companies feared that this

might harm their operations by encouraging public and political intervention in matters which should be left, in their opinion, to corporate officers.

Up to this point the discussion has focused on the competitive harm that interviewees feared would result from broader access to information submitted by them to government. Underlying all these fears of competitive harm is the concern for the loss of profits and competitive advantage that would be occasioned by the loss of information assets; by the loss of technology that would be appropriated by competitors; by the loss of market and pricing strategy that would be undermined by competitors; by the loss of strength of bargaining position with labour, suppliers and customers; and by the loss of funding from creditors and shareholders.

A related concern was expressed about the disclosure of information generated by government about a company's internal operations. Much of the government's involvement with the private sector occurs through testing, inspections, investigation studies and analysis. Although these activities may involve private sources of data -- the "product" in the case of product testing, or the private premises and books in the case of inspections -- the information contained in the final testing and inspection reports is generated by government. For example, while a study on occupational health by the Ministry of Labour is based on data collected from private companies, the methods of analysis and the conclusions are government's.

Public access to this information does not give rise to the claim that competitive harm would result from the loss of informational assets, because the information is generated and the conclusions are drawn by government. However, concern was expressed by several companies about the competitive harm that would occur if such disclosure damaged their reputations in the marketplace. For example, disclosure of a report indicating trace levels of a toxic substance in a particular product might result in damage to a company's reputation and ensuing loss of business and profit. This problem is compounded by the fact that in areas such as occupational health which are inherently controversial, the present state of technological, scientific and medical knowledge cannot determine with any certainty the effects such quantities may have on people exposed to them.

Additional harm to reputation might be caused by the disclosure of what might constitute distorted information. For example, if the Ministry of Consumer and Commercial Relations published a list of the aggregate number of complaints filed against particular business actors, it might be difficult to interpret the information fairly. Large companies which sell more products in the marketplace may receive more complaints than smaller manufacturers. Without the inclusion of information such as gross sales volumes and other material to aid interpretation, the publication of such data may damage a company's reputation.

Similarly, serious harm could result from the disclosure of ongoing investigations into a particular business. The very fact of an

investigation into a company's affairs for tax fraud, securities fraud or unfair business practice could prejudice the company's position with its creditors, customers and suppliers. It would be little consolation to be absolved by the investigation at some later date.

B. Government

In order to assess the impact of freedom of information legislation on government agencies involved in regulatory, entrepreneurial and economic planning activities, interviews were conducted with officials in various ministries. Several concerns were expressed in the course of these interviews. Some officials were of the opinion that access to information relating to their entrepreneurial and planning activities would result in competitive harm to various agencies of government and the provincial economy. Other officials claimed that legislation assuring public access would limit government's ability to collect information and would thus impair its regulatory, entrepreneurial, planning and investigative functions.

1. Competitive Harm to Government and the Economy

In their entrepreneurial role, public entities, like their private counterparts, are subject to the pressures of the marketplace. Although their activities are not solely profit-oriented, many government

agencies participating in the marketplace compete with, sell to, or buy from private business and other governments. Thus, for these activities to be effective, and to assure their broader purpose of a sound competitive economy, the agencies conducting them must be able to operate competitively. Therefore, competitive interests of particular government agencies are in varying degrees related to the competitive interests of the economy as a whole.

In the course of interviews with government officials, four categories of potential harm emerged: loss of technology, loss of bargaining and negotiating strategy, loss of economic opportunity and economic distortions.

Ontario Hydro is involved in a highly complex and technical activity. Although it is a public utility and not solely profit-oriented, it sells excess electricity outside the province. If information about its technology and processes were disclosed, the competitive advantage of Ontario Hydro over other exporting producers such as Hydro Quebec might be reduced. The loss of this technology would deprive the utility of an opportunity to reap profits and would reduce the opportunity to reinvest profits in new energy technology.

The activities of agencies which buy and sell in the marketplace involve contractual arrangements and negotiations
The exposure of government negotiating strategies would weaken the government's bargaining position to shop frugally and sell dearly in

the future. In addition, on larger projects where tenders are sought, information access might facilitate collusive bidding and other manipulations of the tender process.

The province's bargaining position might be weakened in other settings if negotiating strategies were disclosed. For example, the province is involved in international negotiations on tariffs (GATT), and in federal-provincial negotiations on matters such as energy pricing.

In certain circumstances, the very disclosure of the government's intentions to pursue an opportunity may jeopardize the undertaking. For example, the Ministry of Industry and Tourism offers a wide range of consultative and management services to small businesses thoughout the province. It maintains trade missions in several countries and officials are sent abroad to promote Ontario products and to arrange for the licensing of foreign technology for the manufacturing of products at home. These efforts recently resulted in an Ontario company establishing a dairy operation in Africa. However, it was not the Ontario firm that was attempting to negotiate the arrangement, but the ministry, who found the opportunity, marketed the idea and then approached the company to act on it. In these efforts to market Ontario products around the world, it is the ministry that is performing the marketing function prior to negotiations. It performs this role in direct competition with other governments and companies attempting to accomplish the same ends. Any advance indications of a ministry's marketing efforts could jeopardize the chance for successful negotiations by alerting other competitors to pursue the opportunity.

The Ministry of Treasury and Economics frequently competes with other jurisdictions to encourage private enterprise to locate proposed undertakings in the province. Considerable rivalry between Ontario and various American states preceded the decision of the Ford Motor Company to locate a new plant facility in Ontario. Similar rivalries persist between Ontario and Quebec over the location of a proposed General Motors plant. Any disclosure that would indicate the government's intention to pursue similar undertakings might encourage other jurisdictions to compete and jeopardize the success of such negotiations for the province.

Premature announcements of government's efforts to assist in various regions and businesses -- to create greenbelts and conservation areas, and to raise taxes on certain products -- can result in distortions in the marketplace. These distortions may arise in two ways. Although access legislation would permit equal access to all, a lone investor might obtain information about a pending government decision which would result in windfall profits. This gain would be at the expense of other investors who would not have been privy to the information at the same time.

A second distortion would arise when an investor relies on a premature disclosure which proves to be incorrect. A recent court decision highlights the problem.[1] A company seeking trade credit from another

1 Patrick L. Roberts Ltd. v. Sollinger Industries Ltd. and Ontario Development Corporation (1978) 19).R. (2d) 44 (C.A.).

attested to its solvency by claiming it was about to receive a loan from the Ontario Development Corporation (ODC). The trade creditor telephoned the ODC to verify the claim and was informed by a minor official that the company was indeed to receive financial assistance. The trade creditor, relying on the official's statement, proceeded to extend credit in the form of certain equipment which it had installed for the benefit of the would-be loan recipient. In fact, the ODC decision had not been finalized. The decision was eventually made not to award the assistance as the applicant had not filed all the required data necessary for loan approval. When its customer was unable to pay for the equipment, the trade creditor sued the ODC for the value of the equipment it had installed on the grounds that it had relied on the negligent assurance and premature disclosure of the official that the loan was forthcoming. This is only one example of a number of possible situations in which business actors could be expected to rely on prospective government decisions before they are finalized. Similar distortions in the flow of capital and trade credit could result from reliance on premature disclosures.

2. Impairment of Government Sources of Information

The effectiveness of government activities in the marketplace depends upon a continuous flow of accurate, timely and relevant information from a variety of sources. Government officials were of the opinion that access legislation would seriously limit government's ability to

collect information necessary for its regulatory, entrepreneurial, planning and investigative functions. According to present practice and statutory requirement, most information collected from outside sources is assured confidential treatment. However, if access legislation were introduced, the government could no longer provide such assurance of confidentiality, and thereby could lose the cooperation necessary to collect such information from private business, other governments, and third parties.

a) Information Supplied by Private Enterprise

The concern that access legislation would impair the government's ability to collect information from the private sector was expressed both in respect to information filed on a compulsory basis pursuant to statute and information submitted voluntarily.

Numerous statutory schemes require the filing of information on a wide range of subjects. Penalties attach for failure to comply with filing requirements; however the information filed pursuant to statute is self-assessed and government must depend on the cooperation of the submitters of required data to assure its accuracy. The government does not participate in the initial filing of a tax or labour return; it relies instead on the honesty and accuracy of those submitting the information. Although certain ministries how have the power to audit, inspect, investigate and otherwise verify information filed by the

private sector, the existing manpower available for that purpose is surprisingly limited. In the opinion of one official of the Ministry of Revenue, disclosure of tax returns would result in greater distortion and concealment of information. Manpower would thereby have to be increased so that every tax return could be routinely and thoroughly examined.

Greater concern was expressed by government officials about the effects of access legislation on additional information voluntarily filed in conjunction with mandatory filings. Several ministries stated that although they had the statutory power to compel information, effective administration depended upon the cooperative, voluntary flow of information from business. Under existing statutory schemes the government collects information which is not specifically covered by legislation. In the official's view, the regulatory process would be seriously hampered if government were required to pass regulations for the collection of any additional information not covered by an existing statute or regulation. At present, cooperation between government and the private sector makes this unnecessary, thereby making the task of regulation easier and more efficient. For example, government control over environmental pollution is conducted under statutory authority. Both businesses and government monitor effluent levels; however, the remedial process of cleaning up existing pollution depends on private sector technology and a company's willingness to explore through negotiations with government the feasibility of that technology. Private sector willingness to file information in addition

to required filings is evident in other regulatory activities; companies voluntarily file information about consolidated holdings with the Ministry of Revenue and paint manufacturers wishing to qualify for road paint tenders voluntarily submit information about the chemical composition of their paints to the Ministry of Transport.

The government also receives information in the course of contracting with the private sector and through various assistance programs. A company's failure to provide information rules out the opportunity to obtain these benefits. However, by diminishing the government's ability to assure the confidentiality of this information, access legislation may force a company to discontinue its dealings with the province. In instances where large multinationals are encouraged through financial assistance to agree to certain undertakings, there may be a more serious resulting loss to the province.

Government planning activities frequently depend on information supplied by private business. The Ontario Corporations Survey sent to the 200 largest companies in the province[2] is returned on a voluntary basis. Similarly, mining companies are requested to indicate profits for each of their mining operations. While this is the present arrangement, business might well be expected to ignore any requests for voluntary transfers of information which would be subject to public

2 See the discussion in Chapter IV, supra.

scrutiny under access legislation. The government's concern about business unwillingness to supply information was confirmed in the interviews conducted with the private sector. Numerous companies stated that they would refuse to file any information not specifically required by statute and some even indicated they would refuse to comply with statutory filings if the information were disclosed.[3]

b) Information Supplied by Other Governments

In the opinion of some officials interviewed, access legislation would have a serious impact on the availability of federal information. The provincial government relies heavily on the federal government for information. Ontario businesses are required to file detailed information with Statistics Canada.[4] Data is remitted to the province on the consent of the business which files the information.

The confidentiality provisions governing Statistics Canada preclude it from disclosing raw data to any government which has not established an agency for the purpose of information collection government by the same rules of confidentiality. Consent of the submitter is required because Ontario, unlike Quebec, does not have a body created by statute for

3 Some company representatives said that they presently refuse to file information which is required by statute. Although penalties attach for failure to comply with filing requirements, they are rarely if ever enforced.

4 This includes the census filings discussed in Chapter IV, supra.

for the sole purpose of statistical collection.[5] At present, several businesses withhold their consent and with the advent of access legislation, other businesses would likely refuse to allow raw data to be returned to the province.

In addition to material of a statistical nature, numerous taxing statutes provide for the reciprocal sharing of tax information between provinces and between the provincial and federal governments. These statutes specify that one of the conditions of reciprocal sharing is that the information be kept confidential.[6] An official in the Ministry of Revenue also expressed concern about the effect disclosure would have on the cooperative efforts of adjacent provinces in the collection of motor vehicle, gasoline, and tobacco taxes.

The considerable overlap of provincial and federal jurisdiction inevitably leads to the voluntary exchange of information between both levels of government. Agricultural marketing schemes are jointly administered, as are nuclear installations; ODC grants are often matched by federal DREE grants; tax from corporations carrying on business in the province is collected by both governments; and federally incorporated insurance companies' operations in the province are jointly regulated. The list is long. These joint ventures involve informal exchanges of information which may be periodic or regularized in the form of shared data banks, such as the direct link of the Ministry of Tourism

5 See the Statistics Act, S.C. 1970-71-72, c. 15, s. 11 and The Statistics Act, R.S.O. 1970, c. 443.

6 See discussion in Chapter II, supra.

to CANSIM,[7] a data bank at the federal Department of Industry, Trade and Commerce.

The provincial government conducts studies and joint ventures with other countries, and the information presently supplied by these countries may also be jeopardized as a result of disclosure. For example, the Ministry of Labour works with other countries to determine the dangers of certain toxic elements, and the Ministry of the Environment relies on federal and other studies in evaluating the safety of certain pesticides.

c) Information Supplied by Third Parties

Another source of business information potentially jeopardized by disclosure is that supplied by third parties. The government, for example, often verifies the information it collects from business entities. Information filed by licence applicants with the Ministry of Consumer and Commercial Relations is often verified with the OPP, trustees in bankruptcy and others may may have information about the past conduct of the licence applicant. It its assessment of loan applicants, the ODC checks with commercial credit organizations and the applicant's lawyer, banker,

7 This data bank contains detailed information about companies as broken down under the Standard Industrial Classification used throughout Canada and in a somewhat different form in the United States.

accountant and past customers. Ontario Hydro, in assessing a tender application, examines a company's solvency and reliability by checking with the company's suppliers, past customers and others. Applicants for loan and trust corporation and insurance charters are checked for their reputation for honesty in the community and in their past business dealings.

3. Impairment of Government Operations

a) Investigative Activities

The effectiveness of many investigative activities depends on the availability of third party sources of information. Much of this material is gathered through the use of informants without the knowledge of the business being investigated. Under certain legislative schemes such as The Business Practices Act,[8] the decision to institute investigative proceedings is based on information supplied by third party complainants. The investigative process uses other secret methods to gather information, such as surveillance, wiretapping and seizure.

Access to investigative data raises numerous questions which are beyond the scope of this discussion. However, greater accessibility of investigative information would impair the effectiveness of a system which depends on the concealment of ongoing investigations, the security of unidentified sources, the secrecy of information collected and the methods used in collection.

8 S.O. 1974, c. 131.

b) Regulatory Activities

Several ministries expressed concern about the release of information used in decisions to award licences. An official at the Ministry of Consumer and Commercial Relations stated that at present the ministry "accepted" drawings and specifications from various manufacturers, but did not "approve" them in order to avoid appearing to endorse the quality of the product or service. It was felt that access legislation might precipitate greater public pressure on the ministry to become more familiar with the products and services licenced. However, given the ministry's present manpower, the clear endorsement of regulatory standards would be impossible.[9]

Some ministry officials, particularly those dealing with the identification of public health and safety hazards, claimed that release of information other than that currently disclosed in studies, would unduly alarm the public. This could occur in areas where present knowledge is speculative and issues are controversial, such as occupational and environmental health and safety. Furthermore, since most of these matters are highly technical, those interviewed felt that the public might be unable to understand or use the information, and

9 Some officials did state that greater public access might permit government to extricate itself from certain regulatory areas. For example, the Ministry of Industry and Tourism has attempted to vacate its function as the licensor of various tourist operations throughout the province; however, the practice has continued at the industry's request.

that its meaning and significance might be distorted.[10]

c) Entrepreneurial and Planning Activities

Some ministry officials stated that disclosure of the background information used to make final decisions with respect to tax planning and financial assistance would subject the government to public complaints and would impair its ability to function in the future. Those at the ODC expressed concern that the release of detailed information about a loan recipient, used as the basis for the grant of assistance, would result in complaints by competitors that their tax dollars were funding a competitor no worthier of assistance than they. Ministry of Revenue officials were concerned that the disclosure of the difference between book profits and profits for tax purposes would precipitate public outcries about the unfairness of certain tax incentive schemes.

Officials at several ministries claimed that disclosure would hamper the government's ability to plan and set policy. Information released before a final decision would prejudice possible options in the decision-making process. At present, policy decisions are usually

10 For a discussion of the difficulties which surround the disclosure of technical information in Canada, see Williams & Bates, "Technical Decisions and Public Accountability," 19 Can. Pub. Adm. 603 (1976).

announced to the public after a decision has been reached by government officials, although this practice varies from ministry to ministry. For example, the Ministry of Treasury and Economics releases early drafts of proposed tax policies for the comments and reaction of those who may be affected by the proposed changes.[11] However, it was felt that under access legislation, information about proposed policies might be released at an earlier stage and result in more vociferous and active lobbying. This, in turn, might reduce the options open to government or stymie efforts to propose new policies or to change existing ones.

11 Some background information is made available to the general public. For example, see "Canada's Share of the North American Automotive Industry: An Ontario Perspective," prepared by the Ministry of Treasury and Economics, 1978. Other studies, such as "Eastern Ontario Regional Review" specify that they are for the internal use of the ministry.

CHAPTER VII

COMPARATIVE ANALYSIS

All freedom of information statutes, whether enacted or proposed, permit the withholding of some information generated and maintained by government in relation to its involvement in the marketplace. However, the nature and scope of the exempting provisions which protect this information from public access varies considerably. Two approaches can be taken in defining exemptions: to either specify classes of information or records that may be excluded from access, or to enumerate a test of harm, which once met justifies the withholding of the information in question.

For the most part, the American,[1] Nova Scotian,[2] and New Brunswick[3] legislation as well as the proposed Australian Interdepartmental Committee[4]

1 The Freedom of Information Act, 5 U.S.C. 552 governs access to information held by the American federal government. In addition all state legislatures except one have enacted open records laws. For a general discussion of access to state records, see McLain, ed., "A Summary of Freedom of Information and Privacy Laws of the 50 States" Access Reports, Report 3 (1978).

2 S.N.S. 1977, c. 10.

3 Right to Information Act, S.N.B. 1978, c. R-10.3.

4 Report of an interdepartmental committee set up to examine access legislation: Proposed Freedom of Information Legislation (AGPS, 1976) and Policy Proposals for Freedom of Information Legislation Parliamentary paper tabled December 1974 (AGPS, 1974) (hereafter referred to as IDC).

and Senate bills[5] adopt the latter approach. The Australian Minority Report Bill[6] and the Canadian Bar Association Model Bill[7] combine the two approaches by providing an injury test with a list of non-exclusive documents whose release might be reasonably expected to meet the test of injury. The Swedish[8] legislation protects very specific classes of documents, and although it does employ injury tests in some circumstances, they are referable to exclusive classes of specific information.

The following discussion of various legislative models will focus on the provisions which protect information pertaining to government's activities in the marketplace from public access. In turn, the concluding chapter will assess these provisions in light of their appropriateness for Ontario.

5 Freedom of Information Bill, a proposal of the Australian Senate (A.G.P.S., 1978) (hereafter referred to as the Senate Bill).

6 Published as a dissenting report of Commissioner Paul Munro in Report of the Royal Commission on Australian Government Administration (AGPS, 1976) Appendix, Vol. 2, 1-156 (hereafter referred to as the "MRB").

7 Freedom of Information: A Model Bill (Ottawa: Canadian Bar Association, 1978) (hereafter referred to as the "CBA").

8 Freedom of the Press Act, c. 2, art. 1(1) and the Law on the Curtailment of the Right to Demand Official Documents (1937). This is commonly referred to as the "Secrecy Law."

A. The United States Freedom of Information Act

The United States Freedom of Information Act was enacted[9] in 1966 and further amended in 1974 and 1976.[10] It specifies three methods by which information must be made available to the public.[11] Each agency[12] must publish in the Federal Register descriptions of its organization, the procedural rules used in carrying out its function, the substantive rules of general applicability and statements of policy which have been adopted by the agency.[13] The Act further requires each agency to make available for public inspection and copying, information which is not required to be published in the Federal Register. To facilitate this, each agency must maintain an index which lists information such as administrative staff manuals and instructions which might affect a member of the public.[14]

9 5 U.S.C. 552 (1970).

10 Pub. L. 93-502 (1974) and Pub. L. 94-409 (1976).

11 In order to ensure disclosure requirements under sections 552(a)(4) and (6), the Federal District Court has the power to enjoin agencies from withholding information and anyone denied information can apply to the court for review.

12 5 U.S.C. 552(1). The term "agency" is defined under the statute as "each authority of government whether or not it is within or subject to review by another agency. Under the 1974 amendments this definition was expanded in section 552(c) to include executive departments, military departments, government corporations, government-controlled corporations and independent regulatory agencies. Congress and the courts still remain outside the scope of the Act.

13 Section 552(a)(1).

14 Section 552(a)(2).

In addition, the statute requires that each agency make available on request[15] any record[16] in its possession. This general right to request documents is, however, subject to the following nine exemptions[17] with respect to matters that are:

1) specifically authorized or properly classified as secret in the interests of national defence or foreign policy;

2) related solely to the internal personnel rules and practices of an agency;

3) specifically exempted from disclosure by statute;

4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

5) inter-agency or intra-agency memoranda and letters, not otherwise available by law except to an agency in litigation with the agency;

15 Section 552(a)(3). The policy of the Act is disclosure to anyone, regardless of their motive or need for the information. This "any person" access has included foreign governments. See Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (1974).

16 The Act does not define "record" but its meaning has been the subject of some judicial interpretation. In SDC Development Corporation v. Mathews, 542 F. 2d 1116 (1976), the court said: "... the types of documents Congress was seeking to include in the public disclosure provisions of the Freedom of Information Act were those which dealt with the structure, operation and decision-making procedure of various governmental agencies."

Also see Levi Strauss and Co. v. FTC, Civil Action No. C-76-735 (N.D. Cal., July 6, 1976), where the court appeared to uphold a distinction between documents prepared by a private party for submission to government and documents prepared in the course of his business which he does not intend to submit to government. On the facts of the case, the records had been subpoenaed by government and were held not to be government records.

17 552(b)(1)-(9). It falls to the agency to establish that information comes within the exemptions and can thereby be withheld from public access.

6) personnel, medical and similar files whose disclosure would constitute an invasion of privacy;

7) investigatory records compiled for law enforcement purposes;

8) records related to the reputation and supervision of financial institutions;

9) geological information concerning wells.

The American statute has been the subject of considerable legal interpretation. A detailed examination of the law relating to each exemption, however, is beyond the scope of this discussion. Although all nine exemptions can and do pertain to different aspects of government's regulatory, entrepreneurial and planning functions, the focus in this study will be on exemption 4, which permits an agency to deny access if the information requested is:

(a) a trade secret obtained from a person outside government;

(b) a record of or containing confidential commercial information which is privileged or confidential and which has been obtained from a person outside government;

(c) a record of or containing financial information which is privileged or confidential and which has been obtained from a person outside government. 18

For a proper understanding of this exemption, some consideration must be given to the interpretations of the key elements in the exemption given by U.S. courts.

18 552(b)(4).

1. Trade Secret

The trade secret aspect of the fourth exemption has received little attention from American courts.[19] The reason for the lack of interpretation appears to be twofold. Although one might expect courts to consider analogues in the trade secret area using the classification of materials protected there[20] to materials in dispute under the Freedom of Information Act, the trade secret cases are heavily influenced by factors that do not belong in the context of disclosure legislation. In the substantive law of trade secrets, the basic focus is not on the character of the information but on whether the person who released the information or misused it should be held accountable. Under access legislation, the propriety of sanctions for wrongful use or dissemination are irrelevant; the sole issue is the right to government records.[21]

19 See "Would Macy's tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act," (1975), 6 Loyola L.J. 594 at 598. See also M.A. Shapiro and Co. Inc. v. Securities Exchange Commission 339 F. Supp. 467 (1972) in which the court held that the practice and procedure of off-board trading was not a trade secret.

20 Restatement of Torts s. 757 comment b at 5 (1939). See also Kewanee Oil Co. v. Bicron Corp 416 U.S. 470, 94 S Ct 1879 (1974), considered by most authorities to be the leading American case in trade secrets.

21 A narrower and perhaps better definition for purposes of access legislation was used in Consumers Union of the United States v. Veteran's Administration 301 F. Supp. 796 (1969) 801: "An unpatented secret, commercially valuable plan, applicance, formula or process which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities."

Second, the exemption extends protection beyond trade secrets to privileged or confidential financial and commercial information and the judicial preference has been to base decisions to withhold information on these broader and more readily applicable terms of the exemption.

2. Commercial

The meaning of the word "commercial" has been considered by American courts. In one decision,[22] research conducted by a non-profit organization engaged in scholoarly work without remunerative goals was held not to be "commercial" within the meaning of the exemption. In a second case,[23] an accident report filed with the Department of the Air Force was held to be commercial and therefore within the exemption. The court reasoned that:

> Cessna Aircraft Company, being a private defense contractor is unquestionably a commercial enterprise and the reports it generates must generally be considered commercial information which in many instances it may be unwilling to share with competitors. [24]

The foregoing decisions indicate that information is considered to be commercial for the purposes of the exemption if it is submitted by a commercial enterprise.

22 Washington Research Project v. Dept. of Health, Education and Welfare, 504 F. 2d 238 (1974). See also, Getman v. NLRB, 450 F. 2d 670 (1970) and Rabbitt v. Dept. of the Air Force, 383 F. Supp. 1068 (1974).

23 Brockway v. Dept. of the Air Force, 370 F. Supp. 738 (1974).

24 Id., 740.

One commentator has observed that this class of data under exemption 4 protects against commercial firms' attempts to gain "a helpful glimpse of the inner workings of their adversaries' business."[25] However, the word "commercial," within the terms of the exemption, is not referable to any particular class of information. Whether a particular type of information is "commercial" for the purposes of the exemption must be decided on the facts of each case.[26]

25 Note, "Public Disclosure of Confidential Business Information Under the Freedom of Information Act" (1974), 60 Cornell L.R. 109 (1974).

26 The following "commercial information" has been withheld from public access:

- Business statistics:
  Fisher v. Renegotiation Board, 355 F. Supp. 1171 (1973);
  Sterling Drug v. FTC, 450 F. 2d 698 (1971);
- Intricacies of production and testing of products:
  Fisher v. Renegotiation Board, 355 F. Supp. 1171 (1973);
- Technicalities and projections in contract bids:
  Fenster v. Fletcher, Civ. No. 822-71 (D.C.D.C., 1971);
- Contingency plans for business operation:
  National Archives v. CAB, Civ. No. 75-613 (D.C.D.C., 1975);
- Identities of key employees by job skill, level, race and sex:
  Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (1976), and
  Westinghouse v. Schlesinger, 542 F. 2d 1190 (1976);
- Names of oil field suppliers and contractors:
  Continental Oil v. FAC, 579 F. 2d 31 (1975);
- Natural gas resources held by the Federal Power Commission:
  Union Oil v. FPC, 542 F. 2d 1032 (1976);
- Loan application information and updating data on operations:
  Stone v. Export-Import Bank, 552 F. 2d 132 (1977);
- Application to the Atomic Energy Commission to build a nuclear plant:
  Porter County Chapter of the Izaak Walton League of America Inc. v. AEC, 380 F. Supp. 630 (1974);
- Report on Housing discrimination:
  Rural Housing Alliance v. U.S. Department of Agriculture, 498 F. 2d 73 (1974).

3. Financial

Although the courts have held that a wide variety of financial information[27] can be withheld from disclosure, this aspect of the exemption tends to blur into the protections afforded under other exempting provisions. For example, tax information can be denied to a requestor under exemption 3 which prevents the disclosure of

27 The following types of information have been withheld as "financial":

- Loan application figures:
  Rural Housing Alliance v. U.S. Department of Agriculture, 498 F. 2d 73 (1974);
- Cost accounting methods and pricing practices of contractors:
  Honeywell Information Systems v. NASA, Civ. No. 76-353 (D.C.D.C., 1976); and
  Petkas v. Staats, 501 F. 2d 887 (1974);
- Specific interest rates charged by banks to their select customers:
  Consumers Union v. Board of Governors Federal Reserve System, Civ. No. 1766-63 (D.C.D.C., 1974);
- Levels of profit and other profit and loss data:
  Fisher v. Renegotiation Board, 355 F. Supp. 1171 (1973);
  National Parks and Conservation Association v. Kleppe, 547 F. 2d 673; and
  Sterling Drug Inc. v. FTC, 45 F. 2d 698 (1971);
- Overhead and operating costs and prices paid for contracted goods:
  Thrifty Drugs v. FTC, 1976 2 C.C.H. Trade Case 61194 (D.C.D.C., 1976);
  Military Audit Project v. Kettles, Civ. No. 75-666 (D.C.D.C., 1976);
- Cost reports filed by a nursing home:
  McCoy v. Weinberger, 386 F. Supp. 504 (1974);
- Customs filings:
  Ditlow v. Shultz, 517 F. 2d 166 (1975);
- Credit related information:
  Stone v. Export Import Bank, 552 F. 2d 132 (1977);
  Consumers' Union v. Board of Governors, Federal Reserve System, Civ. No. 1766-63 (D.C.D.C., 1974).

information specifically exempted by other statutes.[28] It is the secrecy provisions of American revenue statutes which govern access to tax information, and not the Freedom of Information Act.

The meaning of "financial" in exemption 4 also tends to merge with the privacy protection afforded under exemption 6.[29] In the opinion of one court, exemption 4 was designed to protect the financial information of business entities and not personal information.[30]

Documents prepared in the course of regulating financial institutions are also protected by exemption.[31] Although the provision has been used infrequently, its inclusion in the statute limits the scope of "financial" in exemption 4.

28 552(b)(3). For a discussion of tax information under The Freedom of Information Act, see Note, "Disclosure of Internal Revenue Communications and Information Files Under the Freedom of Information Act" (1975), 8 U. Mich. I.L. Ref. 329. See also Tax Analysts and Advocates v. IRS 362 F. Supp. 1298 (1973).

29 552(b)(6).

30 National Parks and Conservation Association v. Morton, 498 F. 2d 765 (1974). However the distinction between privacy and confidentiality protection for financial information is particularly difficult to draw in the case of sole proprietors. In Ditlow v. Shultz, supra note 27, the court held that personal financial information was protected by exemptions (4) and (6)(privacy). In Rural Housing Alliance v. U.S. Department of Agriculture, supra, note 27, the court held that the amounts and sources of personal income do fall within exemption 4.

31 552(b)(9). There has been little interpretation on the scope of this exemption.

4. Confidential

The considerable confusion surrounding exemption 4 has centred on the ambiguous meaning of the word, "confidential."[32] Those who wish confidentiality can request that government recipients of information withhold it from others. Government may implicitly or expressly promise to respect this confidence. Earlier judicial interpretations[33] accepted this subjective test; however, dissatisfaction with this approach surfaced quickly and one early authority held that "a bare claim or promise of confidentiality by an agency cannot defeat the right of disclosure."[34] The weight of judicial opinion then shifted to a more objective standard of confidentiality. This interpretation relied on the wording of the Senate and House reports[35] that discussed the purpose of the legislation. The Senate Report stated:[36]

32 The section was first thought to include all information submitted to government in confidence. See Davis, "The Information Act: A Preliminary Analysis" (1967), 34 U. Chi. L. Rev. 761 (1967) and Benson v. General Services Adm. 289 F. Supp. 590 (1968) (W.D. Wash. 1968).

33 Consumers Union of the United States v. Veterans Administration, 301 F. Supp. 796 (1969) at p. 801 "... This exemption clearly condones withholding of information only when it is obtained from a person outside the agency and the person wishes the information be kept confidential ... The exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to government under the express or implied promise by government that the information will be kept confidential."

34 Tax Analysts and Advocates v. IRS, 362 F. Supp. 1298 at 1307 (1973).

35 H. Rep. No. 1497, 89th Cong. 2d Sess. (1966) and Senate Report No. 813, 89th Cong., 1st Sess. (1965).

36 Senate Report, 9.

> The exception is necessary to protect the confidentiality of information which is obtained by the government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

Relying on the stated purpose of the exemption, judicial interpretation evolved toward a more objective standard of confidentiality, which would be determined by the customary practice of the person transferring the information.[37] This objective standard was given substantial refinement in a later decision, National Parks v. Morton[38] which is now regarded by most authorities as a leading case on the meaning of "confidential." The court posited a more precise standard by concluding that information would be treated as confidential within the terms of the exemption if its disclosure were likely to: (1) impair the Government's ability to obtain necessary information in the future; or

37 Some courts used a "reasonable man" test to determine if the information would normally be revealed to the public. It presumed that a "reasonable man" would withhold information when it would prejudice his interests not to do so. In Bristol Myers Co. v. FTC, 424 F. 2d 935 (1970) the court remanded the case for a more detailed examination of the reasonableness of the assertions of confidentiality in light of the surrounding circumstances. In M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467 at 471 (1972). The court stated: "Regardless of whether the information was submitted on the express or implied condition that it be kept confidential, a court should determine on an objective basis that this is not the type of information that one would reveal to the public."

See also Fisher v. Renegotiation Board and Sterling Drug Inc. v. FTC, supra, note 26.

38 National Parks and Conservation Association v. Morton, supra note 30.

(2) cause substantial harm to the competitive position of the person from whom the information is obtained.[39]

In National Parks v. Morton, the plaintiff had requested financial data filed with the National Parks Service by an applicant for a concession in a National Park. The court reasoned that since the information was filed by the applicant pursuant to a mandatory requirement, it could not be protected under the first arm of the test as future collection would not be impaired.[40] Under this rationale the exemption would apply only when government obtained information on a voluntary basis. Cases decided subsequent to National Parks have generally adhered to this approach.

In determining whether the information in issue should be protected under the second arm of the test, the Court of Appeal in National Parks v. Kleppe[41] remanded the case to the District Court to review whether disclosure would result in substantial competitive harm to the applicant and recipient of the National Parks concession. Despite

39 Id., 770.

40 The Court based its decision on the fact that the information was submitted as a mandatory condition of the concessionaire's right to operate regardless of whether the information was supplied pursuant to statute, regulation or some less formal mandate. However the test is somewhat unclear. See Mobil Oil v. FTC 406 F. Supp. 305 (1976) where the court held that it is the nature of the information and not the means by which it is collected that should govern.

41 National Parks and Conservation Association v. Kleppe, 547 F. 2d 673 (1976).

the strong wording of the test the court held that:

> No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released. The Court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the concessionaires do business, relying at least in part on relevant and credible opinion testimony. 42

The Court went on further to say that in light of the detailed and comprehensive nature of the financial records at issue:

> ... we consider the likelihood of substantial harm to their competitive position to be virtually axiomatic. Disclosure would provide competitors with valuable insights into the operational strengths and weaknesses of a concessioner, while the non-concessioners could continue in the customary manner of 'playing their cards close to their chest'. Selective pricing, market concentrations, expansion plans and possible takeover bids would be facilitated by knowledge of the financial information the Association seeks. Suppliers, contractors, labour unions and creditors too could use such information to bargain for higher prices, wages or interest rates, while the concessioners' unregulated competitors would not be similarly exposed. 42b

Most courts continue to use the test adopted by National Parks.[43]

42 Id., 683.

42b Id., 684

43 However the test remains far from clear. Despite the test of "substantial competitive harm" laid down by National Parks v. Morton, supra note 30, the court did not entirely discard the earlier subjective test for confidentiality. It stated that the expectation of confidentiality may be relevant in determining whether information falls within the exemption but not solely determinative. The relationship of competitive harm and the expectation of confidentiality is uncertain and the subjective test has reappeared. See Pennzoil Co. v. FPC, 534 F. 2d 677 (1975) and Continental Oil v. FPC, 559 F. 2d 21 (1975). Both decisions concluded that information submitted under an express agreement of confidentiality would be protected by the exemption.

Two significant refinements have emerged in the case law regarding the test of competitive harm. First, an indirect showing of potential injury through extrapolation beyond the information in dispute is sufficient to constitute competitive harm. The information requested may be innocuous in itself but might result in competitive harm when viewed in conjunction with other information. In other words, it may constitute the missing link. For example, Chrysler Corporation won injunctive relief against disclosure of employment statistics by interrelating them with cost saving machinery used in its plants.[44] Chrysler successfully argued that this information viewed together would indicate the timing of capital expenditures which would result in competitive harm. Using the same rationale, Westinghouse also won injunctive relief against the disclosures of labour statistics.[45]

Second, the potential competitive harm may vary in kind, as either damages to profits or injury to reputation and goodwill are covered by the exemption. Head office labour statistics of Sears, Roebuck were withheld from disclosure because of the imminent threat of harmful demonstrations which disclosure would precipitate against Sears.[46] The court stated that "the publicity ... might very well be harmful to Sears in a way that involved economic detriment or long-term public relations detriment and in a way that would be easily

44 Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (1976).

45 Westinghouse Electric v. Schlesinger, 542 F. 2d 1190 (1976).

46 Sears, Roebuck v. Eckard, Civ. No. 76C-2444 (N.D., 1976).

irreparable."[47] In another decision,[48] Sylvania enjoined an agency from disclosing firm-by-firm statistics on accidents that had occurred with certain television models. The manufacturer argued that since the statistics were based on their own records of complaints, the company with the best records would suffer most in the eyes of the public. The court accepted this and held that the material should not be disclosed as the publicity would create an untrue impression and would impair the company's image with the public.

5. Privileged

Little concern has been expressed about the meaning of the word "privileged." Its inclusion in the exemption incorporates the common law concept of immunity from disclosure granted to certain communications in a court of law. American courts recognize a wider number of privileged relationships such as those of doctor-patient and lender-borrower than do Canadian courts.[49] These privileges seem more properly to belong within the scope of the privacy exemption, as decisions in the commercial context have been determined under the broader concept of "confidential."

47 Id., 7.

48 G.T.E. Sylvania v. CPSC, 404 F. Supp. 352 (1975).

49 For a discussion of the Canadian Law see Koroway, "Confidentiality in the Law of Evidence" (1978), 16 Osgoode Hall L.J. 631.

6. Obtained from a Person

A record once submitted to government[50] becomes part of an agency record and subject to the act. However, exemption 4 has been interpreted to mean that any trade secret, commercial or financial information submitted to government retains its private character, and can be withheld from public access.[51] It retains this private character even if it has been copied, summarized, expanded or incorporated into another document.[52]

This feature of the exemption is very significant. As stated earlier, much of government-held information is generated by means of testing, inspection and other forms of appraisal. American courts have concluded that inspection reports, testing results and other similar records do not fall within the exemption and must therefore be accessible to the public. In one decision, the Consumers Union[53] requested results on testing done by the Veteran's Administration on hearing aids. The court held that the information should be disclosed on the ground that government testing was distinct from private data and that industry's participation in the testing was only in the manufacture of the product. The source of

50 See supra note 16, on agency "record."

51 The rationale for this feature of the exemption was to assure that agencies did not evade the purpose of the statute by passing documents back and forth between themselves in confidence. This however has left government trade secrets open to public access.

52 Mobil Oil v. FTC, 406 F. Supp. 305 at 316 (1976).

53 Consumers Union v. Veteran's Administration, 301 F. Supp. 796 (1969).

the product was private, the information was not. In a similarly reasoned decision, appraisals of government contractors were ordered released as they were prepared by an agency representative.[54]

B. Canada and Australia

Australia has been considering the enactment of freedom of information legislation since 1973 when an Interdepartmental Committee (the IDC) was first established to examine the question. In 1974, the committee[55] tabled its report which included draft legislation; on re-examination the IDC produced a further report in 1976. In the same year, a draft freedom of information bill, published by the Royal Commission on Government Administration as a dissenting report, became known as the Minority Report Bill (or MRB).[56] In 1978, a further proposal for access legislation was introduced by the Australian Senate.[57]

Several proposals for access legislation have been considered at the federal level in Canada. Among these are the Green Paper,[58] the

54 Benson v. General Services Administration, 415 F. 2d 878 (1969).

55 Supra note 4.

56 Supra note 6.

57 Supra note 5.

58 Can., Secretary of State, Legislation on Public Access to Government Documents, June, 1977, hereinafter referred to as the "Green Paper."

Report of the Joint Standing Committee on Statutory Instruments,[59] and the Canadian Bar Association Model Bill.[60] The provinces of Nova Scotia[61] and New Brunswick[62] have already passed freedom of information statutes.

The overall scheme of these Australian and Canadian proposals and statutes parallels the American legislation. Similarly interests are protected, and with few exceptions agencies have the discretion to release exempt information.[63] However many of these proposals create new exemptions pertaining to government's role in the marketplace, which were not considered necessary in the United States. In addition, some of them grant broader protection to interests recognized under the U.S. legislation.

The American exemption covers only commercial or financial information acquired by government. Protection of this information is limited to circumstances where disclosure might impair private

59 Can., House of Commons, Standing Joint Committee on Regulations and Other Statutory Instruments, Fifth Report, 28 June 1978.

60 Supra note 7.

61 Supra note 2.

62 Supra note 3.

63 The Nova Scotia and New Brunswick statutes prohibit access to exempt material. For example, s. 4 of the Nova Scotia statute states, "a person shall not be permitted access to information which" falls into one of the enumerated categories.

competitve advantage and government sources.[64] These two protected interests evolved through the judicial interpretations of the meaning of "confidential." While these interests are covered by most Australian and Canadian proposals, a different approach has been followed.

1. Protection of Private Interests

The Australian IDC proposal and the Australian Senate Bill extend broader protection to private entities than is available under the U.S. legislation. The IDC exemptions cover

> Documents the disclosure of which would
>
> a) reveal trade secrets or other commercial or financial information that would expose a commercial or financial enterprise unreasonably to disadvantage. 65

The 1978 Australian Senate proposal contains the following provision:

> A document is an exempt document if its disclosure under this Act concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking and
>
> a) The information relates to trade secrets or relates to other matters the disclosure of which would be reasonably likely to expose the person or undertaking unreasonably to disadvantage ... 66

64 See discussion of National Parks v. Morton, supra.

65 IDC, para. 12.14.

66 Senate Bill, s. 32.

The Canadian Bar Association Bill contains a similar although somewhat more precise provision:

> An agency may refuse to disclose a record which reveals trade secrets or other commercial or financial information, except for statistical aggregates, where such disclosure would reasonably be expected to
>
> b) expose ... a commercial or financial enterprise ... unreasonably to disadvantage in competitive activity or a present or likely process of negotiation, a contractual agreement or other similar process. 67

The language of the IDC and Australian Senate, and Canadian Bar Association bills is not limited to information supplied by business entities. First, unlike the U.S. exemption, they extend protection to information generated internally by government, such as testing results and inspection reports. Second, the test used for assessing harm to private actors, whether it "exposes them unreasonably to disadvantage," is broader than the U.S. "substantial competitive harm" test. It also appears to permit the inclusion of a wider set of factors to be considered on behalf of business in determining whether particular information should be withheld.[68]

67 CBA, s. 26(1)(b).

68 For a fuller discussion of the scope of these provisions, see MRB in Royal Commission on Australian Government Administration, Appendix, Vol. 2, 131, paras. 256-7.

The Australian Minority Report proposal, however, is similar to the American.

> 1) An agency may refuse to disclose a document which reveals information acquired from a commercial or financial institution if
>
> a) the information is a trade secret or other commercial or financial information; and
> b) disclosure would expose the institution unreasonably to disadvantage.
>
> 2) In deciding whether disclosure would expose an institution unreasonably to disadvantage, the agency shall consider and take account of the following considerations, namely,
>
> a) whether the information is generally available to competitors of the institution,
> b) whether the agency would be entitled to disclose the information under this Act if the information were generated by the agency,
> c) whether the information could be disclosed without any substantial adverse impacts on the competitive activities of the institution, and
> d) whether there are any compelling public considerations in favour of disclosure which outweigh any competitive disadvantage to the institution, for instance the public interest in improved competition or in evaluating government regulation of trade practices or environmental controls. 69

The MRB exemption limits protection to information acquired from commercial or financial entities to assure public access to test results, inspection reports and other similar documents which are generated by government about private entities. It posits a more objective standard of unreasonable disadvantage by incorporating some of the criteria used by American courts in assessing competitive harm.[70]

69 MRB, s. 32(1) and (2).

70 See MRB, 132, paras. 260-61.

In addition to the subsection cited earlier from the Canadian Bar Association Bill, the proposal also permits the withholding of trade secrets, commercial or financial information "where disclosure would be reasonably expected to result in undue loss or gain to a person ..."[71] Whereas this exempting language is redundant in the Canadian Bar Association proposal, it is the only protection relating specifically to private competitive interests in the Nova Scotia and New Brunswick statutes.[72]

2. Protection of Government Sources

Although the harm to private entities can extend beyond information acquired by government under the proposals put forward by the Australian IDC, Senate, and the Canadian Bar Association, they contain separate provisions which govern the confidentiality of information submitted by private entities. The IDC proposal for the protection of private entities also exempts:

> Documents the disclosure of which would
>
> b) otherwise constitute a breach of confidence by revealing material obtained in confidence. 73

71 CBA, s. 26(1)(c).

72 Nova Scotia Freedom of Information Act, 1977, s. 4(b), New Brunswick Right to Information Act, s. 6(c).

73 IDC, paras. 12.15 to 12.17.

The Australian Senate Bill includes the following provision:

> A document is an exempt document if its disclosure under this Act would constitute a breach of confidence. 74

By incorporating the common law doctrine of breach of confidence, these exemptions extend protection to any information for which the submitter requests confidentiality and the government expressly or impliedly promises it.[75] The test for confidentiality is the same subjective test adopted by earlier American decisions and subsequently rejected in later case law. A similar test is found in the New Brunswick Right to Information Act.

The Canadian Bar Association bill, while extending its test of competitive harm beyond information acquired by government, adopts the more restrictive American test for the confidentiality of information submitted by private business entities. Trade secrets and commercial or financial information may be withheld where:

> (d) the information having been supplied to an agency in confidence, gives rise to a justifiable fear that information of that type would no longer be supplied to the agency and it is in the public interest that information of that type continue to be supplied to an agency. 76

74 Australian Senate Bill, s. 34.

75 For a more detailed discussion on breach of confidence see Chapter V.

76 CBA, s. 26(1)(d).

The Australian Minority Report Bill includes a similar section,[77] but specifically excludes any trade secret, commercial or financial information acquired from commercial or financial institutions. Therefore this proposal does not interrelate the protection of private entities with the protection of government sources of commercial information which may be harmed by disclosure.[78] The provision protecting confidentiality may extend additional protection to commercial and financial institutions filing information which does not fall within the class of trade secrets, commercial or financial information. It may also extend protection to individuals who file this type of information in confidence.

3. The Interests of Government Agencies and the Economy

Most of the Australian and Canadian proposals and statutes contain additional exempting provisions which are not found in the American statute. These exemptions govern information generated in the course of government's regulatory, entrepreneurial and planning activities and are designed to protect the competitive position of government agencies and the economy.

77 MRB s. 33(1) and (2).

78 MRB, 132-33, para. 262. This exclusion is explained as follows: "To the extent that a conference is seriously regarded as a condition of supplying information, this will be reflected in the criteria of 'unreasonable disadvantage' or 'substantial adverse impact on the competitive activities of the institution.'"

a) The Interests of Government Agencies

The U.S. Freedom of Information Act exempts records that are related solely to an agency's internal personnel rules and practices.[79] The exemption has been interpreted to exclude concerns about administrative efficiency.[80] However, several Australian and Canadian exemptions include provisions which protect documents to assure the operational efficiency and the competitive advantage of government.

The IDC proposed the following exemption:

> Documents the disclosure of which would be reasonably likely to have a substantial adverse effect on
>
> a) the public interest in the economical functions of a department, or
> b) the financial, property or personal interests of a department. 81

The Australian Senate proposal contained a similar provision:

> A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse impact on the financial, property or staff management interests of the Commonwealth or an agency or which otherwise have a substantial effect on the efficient and economical conduct of the affairs of an agency. 82

79 5 U.S.C. 552(b)(2).

80 The American courts have ignored questions of whether disclosure would affect the efficiency and economy of departmental operations. In Wellford v. Harden, 444 F. 2d 21 at 24 (1971), the court said; "The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest."

81 IDC, paras. 12.14-17.

82 Senate Bill, s. 29.

In Canada, the Nova Scotia legislation prevents disclosure of information that "would jeopardize the ability of the government to function on a competitive basis."[83]

The Canadian Bar Association Bill, as well as the federal Green paper, not only exempt matters that would affect the competitive position of government, but extend the same protection to public enterprise that is granted to the private sector. As indicated earlier, the CBA version permits the withholding of trade secrets, commercial or financial information which would

> b) expose the agency or a commercial or financial institution, including a Crown corporation, unreasonably to disadvantage in competitive activity or in a present or likely process of negotiation, a contractual arrangement or other similar process. 84

The Minority Report Bill, on the other hand, reduces the scope of these exemptions by listing more specific examples of the types of documents that should be protected to preserve governmental interests. The list includes:[85]

83 Nova Scotia Freedom of Information Act, s. 4(c).

84 CBA, s. 26(1)(b). Section 26(1)(c) cited supra in 62 also extends to government institutions. The full text of the provision permits the withholding of information where disclosure would reasonably be expected to "result in undue gain or loss to a person, group, committee or financial institution or agency." Governmental agencies are similarly included in the Nova Scotia and New Brunwick provisions cited supra, note 63.

85 MRB 36(c)(d)(f)(g).

c) a document containing a trade secret of an agency or, in the case of an agency engaged in trade and commerce, commercial or financial information that would expose the agency unreasonably to disadvantage.

d) a document containing the results of scientific research undertaken by an agency, where the research project or that part of a research project to which the results relate is not yet complete or where the agency intends to sell the results of the research.

f) a document containing instructions to officers of an agency in the procedures to be followed and the criteria to be applied in negotiation including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement and cases and in similar activities where the disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.

g) a contract tender where the contract is yet to be awarded.

b) The Interests of the Economy

The American legislation does not contain a separate exemption protecting the interests of the economy. It does, however, exclude matters pertaining to national security, intra-agency memoranda, and the supervision and regulation of financial institutions.[86] These provisions, particularly the latter, shield some information which relates to the economic interests of the country. Most Australian and Canadian legislation, in addition to protecting policy and security

86 5 U.S.C. 552(b)(1), (5), and (9).

matters, includes a separate exemption to limit the disclosure of documents which may harm the economic interests of the country. In Australia, the IDC proposed the following exemptions:

> Documents the disclosure of which would be reasonably likely to have a substantial adverse effect on Australia's economic interests. 87

The Senate Bill contains a similar provision:

> A document is an exempt document if its disclosure would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy. 88

The Canadian Bar Association Model Bill and the Australian Minority Report Bill contain similar and more detailed provisions for the protection of economic interests. The Canadian Bar Association proposal exempts the disclosure of trade secrets, commercial or financial information where it would reasonably be expected to

> have a substantial adverse effect on the legitimate economic interests of Canada, for instance,
>
> (i) by revealing information relating to the currency or to the coinage or legal tender, or
> (ii) by revealing consideration of a contemplated movement in bank interest or tariff rates, in sales or acquisition of land or property, urban rezoning or a like proposal, or
> (iii) by impeding regulation in supervision of financial institutions, foreign investment, the stock exchange, or imports or exports, 89

87 IDC para. 12.18-20.

88 Senate Bill, s. 33.

89 CBA s. 26(1)(a).

The Australian Minority Report Bill provisions are almost identically worded.[90]

C. Sweden

Swedish citizens have long been granted rights of access to government documents and the Swedish legislation represents the pioneering efforts of all western democracies in assuring these rights. The Freedom of the Press Act,[91] one of the four statutes which comprise the Swedish constitution, guarantees the "publicity" of official documents and the rights of citizen access to them. The act sets out the so-called "principles of publicity" which provide that the right of access to official documents[92] is

> subject only to such restrictions that are demanded either out of consideration for the security of the realm and its relations with foreign powers, or with regard to the activities for inspection, control or other supervisions carried out by public authorities, or for the prevention and prosecution of crime, or in order to protect the legitimate economic interests of the State, communities and individuals, or out of consideration for the maintenance of privacy, security or the person, decency and morality. [93]

90 MRB s. 36(a)(b) and (e).

91 Freedom of the Press Act, Ch. 2, part 1.

92 A document is "official" for the purposes of the statute, when it is received by government from a private source or when it is placed on official file. "Working papers" are not official documents and are therefore excluded from the scope of access.

93 Supra, note 91.

The Freedom of the Press Act also specifies that these restrictions on access are to be defined in separate legislation. The Secrecy Act, officially entitled the Law on the Curtailment of the Right to Demand Official Documents,[94] governs the restrictions to access by exempting forty-three specific classes of documents from release to the public. The following classes of information, which are more directly related to the government's activities in the marketplace, are protected under separate provisions of the Secrecy Act:

- preparatory material used in audits, inspections and testing; [95]
- scientific and technical experiments, tests and investigations prepared by government; [96]
- statistical information; [97]
- tax information; [98]
- information about the regulation of financial institutions, stock exchanges and stockbrokers; [99]
- information about the function and expense of timber surveys; [100]

94 Law on the Curtailment of the Right to Demand Official Documents (1937).

95 Secrecy Law, s. 7, as translated by Anderson in "Access to Public Documents in Sweden" (1973) Am. J. of Comp. Law 452.

96 Id., s. 9.

97 Id., s. 16.

98 Id., s. 17.

99 Id., s. 18.

100 Id., s. 22.

- labour arbitrations; 101
- government financial assistance; 102
- information about regulation of the work force insofar as they touch on employers trade secrets; 103
- information pertaining to government tendering; 104
- patent information; 105
- information on price and competition; 106
- information about communications and customs. 107

Under the American and most proposed Australian and Canadian access legislation, the secrecy of exempt material is permitted and not required. The discretion of government agencies qualifies the protection of exempt information. Several of the Swedish exemptions adopt a similar approach. For example, information about the working conditions of foreign labourers can be disclosed provided they do not disclose trade secrets and redound to the injury of the employer.[108] As well, documents produced in the course of regulating financial

101 Id., s. 24.

102 Id., s. 32.

103 Id., s. 19.

104 Id., s. 34.

105 Id., s. 23.

106 Id., s. 20.

107 Id., s. 28.

108 Supra, note 103.

institutions may be released if disclosure would not harm the association or concern in question.[109] Statistical information may also be released, upon examination of the requestor's need and other circumstances, providing assurance is given that the information will not be used to the detriment of the data subject.[110]

The Swedish legislation qualifies secrecy in a number of different ways. Some documents must be kept secret unless the source of information, either government or business, consents to its disclosure. For example, investigations and experiments of a scientific and technical nature may be released only on consent of the government authorities responsible for them.[111] Information about tendering prior to final contracts may be made available only on consent of the government authority involved.[112] Documents referring to particular loan applicants may be withheld from disclosure unless the applicant consents to its release.[113]

On the other hand, some information, otherwise secret to the general public, must be released to certain requestors. For example, labour

109 Supra, note 99.

110 Supra, note 97.

111 Supra, note 96.

112 Supra, note 104.

113 Supra, note 102.

statistics must be released to wage earners for verification on the assurance that such information will not be further disclosed, and other statistical data may be made available to researchers on a similar assurance.

Each exemption in the Swedish legislation contains a different time period for secrecy. Documents relating to criminal conduct and certain matters of personal privacy are withheld for seventy years.[114] Documents pertaining to contracts for the sale of water and energy may be released after two years. The standard period of secrecy for most documents, however, is twenty years.

D. Reverse Freedom of Information Actions and the Rights of Private Submitters

Most freedom of information statutes, including the American, confer on requestors who are denied access, the right to seek full and independent judicial review of an agency's decision to withhold information.[115] In the United States, many judicial pronouncements on the scope and meaning of exemption 4 have resulted from requesters exercising such a right. In this type of situation the litigation is

114 Secrecy Law, s. 30.

115 5 U.S.C. 552(a)(4) and (6).

between the agency and the requester who is seeking to review a denial of access.

The American exemption has also been brought before the courts by private submitters who have sought to enjoin an agency's decision to disclose information. These suits, which have frequently been filed by the private sector to prevent disclosure of commercially valuable information, have come to be known as "reverse freedom of information actions."[116]

The American Act confers no express statutory right on submitters of information to request courts to substitute their own independent decisions on access for those of government agencies. Reverse freedom of information suits were filed on the assumption that a private submitter had an implied substantive right to sue, because the Act prohibited the disclosure of exempt information.[117] The leading case which upheld the implied right of submitters to enjoin disclosure of information falling within the terms of exemption 4 stated:

116 For a more detailed discussion of "reverse actions" see Note, "Protection From Government Disclosure: The Reverse FOIA Suit" (1976), Duke L.J. 330; Clement, "The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit" (1977), 55 Texas L. Rev. 574; Draschler, "The Freedom of Information Act and the 'Right' of Non-Disclosure" (1976), 28 Admin. L. Rev. 1; Note, "Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection" (1976), 20 N.W. U. L. Rev. 995 (1976); O'Reilly, Federal Information Disclosure (New York: McGraw-Hill, 1977).

117 The Act is said "not to apply" to exempt material.

> ... one of the sections of the Act, which declared what private information acquired by the government "should not be open to public disclosure" was exemption four ... The protection from disclosure given such information by exemption four was stated in the legislative hearings to have been granted to such information "not only as a matter of fairness but as a matter of right, and as a matter basic to our free enterprise system". In enacting such exemption, the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private interest ... And when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the party to invoke the equity powers of the court to assure him protection. 118

The court further added that an agency decision should be subject to judicial review prior to disclosure, and in determining the scope the review concluded:

> ... Congress clearly did not intend to commit the disclosure decision totally to agency discretion ... The supplier, if his claim to protection is as Morton declared a "matter of right", is entitled to a fair and adequate hearing, on proper evidence, in the courts, a hearing that is no less broad and adequate than that given to the merely curious who may seek disclosure. 119

118 Westinghouse Electric Corp. v. Schlesinger, supra note 26. The court came to its decision after examining the underlying rationale and concluded that the exemptions prohibited disclosure. At pages 1210-11, it said: "In drafting the Act, Congress sought carefully to balance the right of the public to know what its government was doing against the rights of the individual to the privacy of private confidential information and to make clear the distinction between the right of the individual to the protection from disclosure of confidential information. In summary, the Act was intended, to use the language of the Senate Report, to set up workable standards for what records should and should not be open to public inspection."

119 Id., 1215.

American judicial opinion, however, was divided on whether a private party had an implied right to enjoin disclosure.[120] The Supreme Court recently ended the uncertainty surrounding the rights of private submitters in Chrysler Corp. v. Brown,[121] concluding that the Act did not permit private parties to block the release of documents. The Court came to its decision after determining that the Act did not prohibit the disclosure of exempt material, but merely granted agencies the discretion to withhold it:

> The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision making. Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information within government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude in certain circumstances to afford the confidentiality desired by these submitters. But the Congressional concern was with the agency's need or preference for confidentiality. The FOIA by itself protects the submitter's interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

120 The leading case which had denied submitters a right to independent review was Charles River Park "A" Inc. v. Department of Urban Development, 300 F. Supp. 212 (1973). See also Pennzoil Co. v. FPC, supra note 43. It is significant that most courts which adopted the Westinghouse approach have been dealing with commercially valuable information under exemption 4.

See also: Continental Oil v. FPC, supra note 26; McCoy v. Weinberger, 385 F. Supp. 504 (W.D. Ky. 1974); U.S. Steel Corp. v. Schlesinger, 8 FDD 9719 (ED va 1974); Union Oil v. FPC, supra note 26.

121 Chrysler Corp. v. Brown (No. 77-922) decided Apr. 29, 1979.

> Enlarging access to governmental information undoubtedly cuts against the privacy concerns of non-governmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure. [122]

After the Chrysler decision, it was thus made clear that in a reverse freedom of information action, the court could review an agency decision to disclose to determine only whether the agency had acted arbitrarily or capriciously under the standard of the Administrative Procedure Act. Private submitters can no longer request a court to substitute its independent judgment about disclosure for that of an agency.

No other freedom of information legislation expressly confers a right on submitters to enjoin disclosure. Although the language of the Nova Scotia and New Brunswick exemptions evidence a clear intent that exempt information must be withheld,[123] neither statute confers an express right on submitters to ensure that exempt information is withheld from public access. The Canadian Bar Association Model Bill and the Australian Minority Report, however, do provide certain limited rights to submitters. The Australian proposal is more restrictive, giving submitters a right to be notified or apply to be made a party

122 Id., slip opinion, 8-9.

123 See supra, notes 2 and 3.

at review proceedings of an agency's refusal to disclose information.[124]

The Canadian Bar Association Bill contains the following provisions:

> An agency to which a request for a record has been made and in regard to which it considers that a claim for exemption from disclosure under ... section 26 (commercial exemptions) may be appropriate, shall prior to any disclosure of the record notify any person whose interests could be in its view substantially affected by such disclosure and afford such person an opportunity to be heard.
>
> 18. (1) Interests of other Parties. -- Any person whose interests would be substantially affected by the disclosure of a record by reason of the fact that it may be subject to exemption from disclosure under sections 25 or 26 may apply to an agency for an opportunity to be heard prior to the disclosure of such record and the agency shall thereupon provide such person with such an opportunity to be heard.
>
> (2) Certificate of Interest. -- Where an agency, having notified any interested person under the provisions of subsection 6(4) of his right to be heard, or having received an application to be heard from any person under the provisions of subsection 18(1), and after affording an opportunity to be heard to such person, nevertheless decides to disclose such record, the agency shall prior to such disclosure furnish such person with a certificate of its intention to so disclose and shall notify such person of his rights under subsection 18(3).
>
> (3) Application to Court. -- Notwithstanding anything in this Act, any person who receives a certificate under subsection (2) may apply to the Court within ten days for review of the decision of the agency and pending the completion of such review, the agency shall not disclose the record.
>
> (4) Idem. -- In any proceeding before the Court involving an appeal from a refusal by an agency to disclose a record, any person whose interests would be substantially affected by such disclosure by reason of the fact that it may be subject to exemption from disclosure under sections 25 or 26 may apply to the Court to be made a party to the proceeding. [125]

124 MRB, ss. 50, 17.

125 CBA, c. 64, s. 18.

Although this proposal permits a similar opportunity for submitters and others to be heard at review proceedings concerning denials of access, it adds two significant rights which were not included in the Australian Minority Report Bill. First, the CBA proposal would permit any person whose interests would be affected by disclosure of a requested document to be heard before the agency makes its initial decision to withhold or disclose. The Canadian Bar Association Model Bill thus grants submitters and others a right to intervene at an earlier stage of the process than does the Australian proposal. Second, submitters are permitted to request judicial review of an agency decision to disclose information. Although it is unclear whether this is an express conferral of the right to enjoin disclosure, the bill grants submitters some opportunity for judicial review of an agency's decision to disclose information which would affect them.[126]

126 The CBA based its decision to include these provisions on the following reasons: "American experience with cases of this kind, in which interested parties have sought to maintain the confidentiality of personal or commercial information (known as 'reverse freedom of information' cases) indicates that provisions such as those in section 18 must be provided to protect the interests of all parties concerned. While such a provision no doubt encroaches on the overall policy thrust of the Act, i.e., to provide to the public maximum disclosure both quickly and inexpensively, it must be included in order to protect the legitimate interests of persons outside government." Supra, note 7, 20.

CHAPTER VIII

OBSERVATIONS AND CONCLUSIONS

Freedom of information legislation has as its purpose the establishment of the principle that public access to government documents must be the rule and not the exception. The importance of public access to political accountability is clear. The principle, however, is not unqualified. Like other democratic principles, it must be balanced against other competing interests which justify certain exceptions.

The preceding discussion has attempted to examine some of the competing interests which should be considered prior to the implementation of access legislation in Ontario. It has focused particular attention on the public, governmental, and private interests which may justify continued secrecy for information relating to various aspects of government's regulatory, entrepreneurial and economic planning functions. Most proponents of access legislation recognize, as evidenced in the legislation of other jurisdictions, that some of the information generated in the course of these activities should legitimately be withheld from public access.

Some protection from unrestricted access to this information is necessary. However, questions relating to the nature and extent of these protections are more difficult to resolve. Efforts to assess

the legitimacy of the concerns raised by business and government and the degree of secrecy necessary for the protection of legitimate interests can be guided by the exemptions drafted in other jurisdictions. The American experience since the enactment of freedom of information legislation in 1966 provides useful insights for any jurisdiction contemplating the adoption of similar policy objectives. Despite the difference in the American structure of government, which relies heavily on the interplay of competing institutions in the balancing of access and secrecy, most Canadian and Australian proposals which restrict public access to protect the competitive interests of business and government have been drafted in light of developments under the American legislation.[1]

While it is the purpose of access legislation to reveal the functions, operations and activities of government, most existing or proposed statutes have limited the availability of some information to protect the interests of private business institutions.

1 Little has been written about the experience under the Nova Scotia and New Brunswick statutes. However, for a recent decision on the Nova Scotia legislation, see A.G. Nova Scotia v. Murphy (1979), 93 D.L.R. (3d) 329 (N.S.S.C., App. Div.).

Although the Swedish legislation contains a number of features that merit consideration, it is not the most suitable model for Ontario because the Swedish system of government differs significantly from our own. For example, administrative functions and policy functions in Sweden are divided into different arms of governmental activity and the principle of access applies only to information generated through the administrative process. In Ontario both administrative and policy functions are performed by the executive branch or ministries of government.

A. Protection for Private Business Interests

1. Competitive Harm

Unrestricted access to information maintained in the course of government's activities in the marketplace would expose the internal functions, operations and activities of private business entities. Considerable concern was expressed by business representatives in the province about the competitive harm that would result from the loss of informational assets. The legitimacy of their claims is supported by economists who confirm the competitive importance of secrecy. Furthermore, in certain circumstances, the law recognizes that secrecy protects not only the private interests in information but the broader public interests in the development and invention of new ideas.

Under the American legislation, one of the legal restrictions on public access rests on determinations of whether disclosure would cause substantial competitive harm to private business entities. The test laid down by the American courts extends beyond legal protections for trade secrecy but has been the subject of considerable criticism, such as the following:

> The National Parks test of confidentiality is undesirable in several respects ... The National Parks test imposes a nearly impossible burden of proof on the party seeking to bar disclosure by requiring it to make a concrete showing within a period of ten days, that substantial competitive injury will result when the submitter may not know whether the information will be used by a competitor, and if so, how.

> In this regard it cannot always be demonstrated prospectively that information whose disclosure is sought will, if disclosed, competitively impair the submitter ... Businesses which are unaware of other data which their competitors have collected may be hard pressed to concretely demonstrate under National Parks that disclosure will cause substantial competitive injury even though they know that the likelihood of such harm at a future date is sufficiently great to justify the standard business practice of not disclosing the information. 2

In the words of another critic:

> ... as a practical matter, there is a world of difference between providing that information which would be useful to a competitor and proving that it is likely to harm the submitter's competitive position ... It would be extraordinarily difficult and require sophisticated economic analysis. It would be necessary to define the relative competitive positions of the companies in the industry. Assuming it could be shown that a competitor would be likely to make use of the submitter's information it would be necessary to prove that the use which the competition would make of the information would be likely to have an effect on the submitter's competitive position ... Such proof obviously would be difficult and costly to present. 3

2 The Business Records Exemption of the Freedom of Information Act, Hearings before a subcommittee of the House Committee on Government Operations, 95th Cong., 1st Sess. (Washington, D.C.: USGPO, 1977) 117 (testimony of B.A. Braverman) (hereafter cited as "hearings").

3 Patten and Weinstein, "Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations" (1977), 29 Admin. L. Rev. 193, at 199. For further commentary see: Katz, "The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act" (1970), 48 Tex. L. Rev. 1261; Note, "Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Towards a More Objective Standard" (1974), Cornell L. Rev. 109; O'Reilly, "Government Disclosure of Private Secrets under the Freedom of Information Act" (1975), 30 Bus. Lawyer 1125; Note, "A Review of the Fourth Exemption of the Freedom of Information Act" (1976), 9 Akron L. Rev. 673; Note, "The Freedom of Information Act: An Examination of the Commercial or Financial Exemption" (1976), 16 Santa Clara L. Rev. 193.

In fact, the test of competitive harm in the United States has been costly, time-consuming and difficult to apply. Some requests have been awaiting final determination by the courts for several years.[4] The issues raised in determinations about competitive harm are complex, and do not admit of easy answers.

Uncertainty inevitably surrounds a restriction on public access which is not clearly referable to particular classes of information. Ideally, an access statute would assure the protection of private interests by incorporating criteria which could be quickly, simply and easily applied. However, no practical test could assure full and certain protection without undermining public access. Some attempt at greater certainty than appears in the American legislation could be achieved by the incorporation of more precise criteria for evaluating potential competitive harm.

An Ontario statute should include guidelines similar to those proposed by the Australian Minority Report; namely, whether information is generally available to competitors, and whether the disclosure would cause a substantial adverse impact. In particular, it should state that any compelling public considerations favouring disclosure can outweigh private competitive interests. This guideline makes clear that determinations about protection for competitive harm are not equated with assurances of competitive advantage. The Australian

4 Hearings, testimony of Diane B. Cohn, supra note 2, 152.

proposal lists among the compelling reasons for disclosure the "improved competition, evaluation of government regulation of trade practices, or environmental control." Questions of "improved competition" lie beyond provincial jurisdiction and given their complexity might be better left outside the scope of access legislation to be assessed in the context of specific statutory regulation. The remaining considerations should be included in an Ontario statute, but the list should be expanded to include questions of public health and safety.

A freedom of information statute in Ontario should also specify that the competitive harm caused by disclosure diminishes over time and that the duration of time for the withholding of information can be limited. This would not only incorporate a recent American recommendation "that non-disclosure orders be as narrow in scope and purpose and time of effectiveness as possible,"[5] but also borrows an interesting and important feature of the Swedish legislation.

2. Confidentiality

The second restriction on public access for the protection of private entities under the American legislation rests on a determination of

5 Freedom of Information Requests for Business Data and Reverse FOIA Lawsuits: 25th Report of the Committee on Government Operations, 1978, at 4.

whether confidence must be preserved in order to protect government sources of information. The test is unclear and has been the subject of some criticism. The Australian Minority Report rejected this feature of the American exemption:

> There is no paragraph stating that an agency can consider whether the information in question has been supplied by a corporation on a confidential basis. The reason for this limitation is that the case for treating business confidences seriously is apt to be overstated, to the exclusion of other relevant considerations. The more realistic assessment, made by the Director of Information in the U.S. Department of Agriculture, is that "once the initial reaction to disclosure is experienced, business between government and industry proceeds quite normally." Similarly, the Assistant General Counsel for the FDA -- clearly the largest repository of scientific data in the world at this time on ... food, drugs, cosmetics, medical devices and radiological products on which roughly 30 cents out of every dollar is spent -- has commented that since the agency raised its level of disclosure from 10 percent to 90 percent "it is readily apparent to all of us in the agency [that this practice] has not affected the work of the agency one iota." To the extent that a confidence is seriously regarded as a condition of supplying information, this will be reflected in the criteria of "unreasonable disadvantage" or "substantial adverse impact" on the competitive activities of the institution. 6

The Australian rejection of this aspect of the American test is based on the assumption that business would only regard information as confidential where it is perceived that disclosure might result in disadvantage. A protection from unreasonable disadvantage would also have the effect of adequately assuring government services. Ontario should adopt a similar approach. It is more workable than the American

6 MRB, 132, para. 262.

approach as it avoids the interpretive difficulties which have surrounded determinations about the voluntariness with which information is supplied to government.

3. Private Source Information

The American legislation protects private interests from the competitive impact of public access only when the information has been obtained by government from a private business source. Information generated by government does not fall within the exemption. This protection of private source information is based on the assumption that private documents once acquired by government retain their private character even though they become part of a public record.

Considerable difficulty arises when information is characterized by looking to its source. This approach must grapple with the same difficulties faced by economic and legal theorists in their efforts to view information as proprietary. Critics have claimed that it provides uncertain protection of "private" documents.

> Oftentimes what an agency may deem to be a "pure" government generated document may well be composed of information which was derived from reports submitted by several private sources. In the hands of skillful minds, the wheel may be disassembled so as to expose the spoke, i.e., the source. In view of this problem, some determination must be made as to whether any such "pure" documents exist, and if so, set standards for classifying such documents. There should be no short circuiting of the FOIA procedures where a private source

> will be exposed. We do not believe, however, that a "pure" government generated document exists. [7]

Furthermore, the assumption that protection should be extended only to private source data ignores the concerns raised in the course of interviews about the harms which might be considered to private entities by the disclosure of government-generated data. Government-generated inspection reports on toxic substances linked to uncertain problems of health and safety have, in fact, been exempted from public access in other jurisdictions on the grounds that disclosure of such information "may expose private interests unreasonably to disadvantage."[8]

It is difficult for the government to arrive at firm conclusions and good decisions about the nature of the benefits and risks of certain technologies and chemicals employed by private entities:

> On the one hand, the [petrochemical] industry deals with a very large number of chemicals which have either been shown to have carcinogenic potential in laboratory animals, or are related to these chemicals ... in several instances ... occupational cancers in humans have been clearly established. On the other hand, the number of chemical agents so incriminated has remained comparatively small and the number of workers involved limited.
> Still, to find that a key chemical in the giant plastic industry was clearly carcinogenic has been disconcerting. Further, if vinyl chloride's carcinogenicity had been expressed in increased risk of cancer of the lungs or colon, elevated rates of neoplasms of those sites among the affected workers might not have been identified for some years, at the earliest. [9]

7 See Hearings, testimony of William J. Roche, General Counsel of Texas Instruments, supra note 2, 276-77.

8 IDC proposal.

9 Irving J. Selikoff, "Recent Perspectives in Occupational Cancer," Ambio 4, No. 1, 14-17.

To permit the government to withhold information until clear indications of health hazards are found, in order to protect private entities from public awareness about the risk of such hazards, is to deny the non-technical employee and consumer the opportunity to assess the health and safety of the world in which he lives and works. Legislation which has as its purpose the greater accountability of government to the public cannot permit the withholding of this information for fear of its imperfect accuracy or its speculativeness. Therefore, despite the interpretative difficulties which surround the protection of information obtained by government from an outside business source and the additional harm which might result from disclosure of speculative government-generated data, Ontario should adopt the American approach and protect only information "obtained" by government.

4. "Any Person" Access

Most freedom of information statutes are designed to obviate any standing requirements for persons seeking to obtain government records. However, "any person" access does raise particular problems in the context of commercially valuable information. Some critics of the American legislation have claimed that by granting access to any person regardless of motive or need the Act has been used by many requestors solely for the purpose of gaining access to information filed by business:

> Today the [Freedom of Information Act] is being utilized by an extremely diverse group as a means of obtaining ... private data. The Act has been employed by competitors, analysts, investors, disgruntled employees, projected and existing adverse litigants, self-styled public interest groups, foreign businesses and governments and a wide variety of others to obtain information concerning private businesses which, but for the FOIA, would not be available to them. Yet, now, for the price of a postage stamp, such persons can generally obtain such data from Federal agencies. The use of the FOIA for surveillance of private affairs was not intended by Congress and needs to be remedied. 10

The right of "any person" to request information under the Act has facilitated the use by foreign and domestic business and by foreign governments as vehicles of industrial espionage. The extent of the practice is not known, as lawyers frequently request the information on behalf of unnamed clients, but the following examples of requests under the American Act are instructive:

- A company sought information pertaining to a design for an inflatable raft that was submitted by its competitor for approval to the FAA. The company received the information which helped it to design its own raft and win a substantial contract away from the competitor. 11

- A railroad company obtained statistics from the Interstate Commerce Commission on freight cars bought and sold by competitors which enabled it to determine the capacity and age distribution of their competitors' assets. 12

- A large electronics company obtained the reports paid for and submitted by other companies on how Japan's own tariff barriers hurt sales in Japan. 13

10 Hearings, testimony of B.A. Braverman, supra, note 2.

11 Montgomery, Peters, Weinberg, "The Freedom of Information Act: Strategic Opportunities and Threats" (1978) Sloan Management Review, 1.

12 Id.

13 Id.

- Another company obtained an FAA inspector's report on a large pharmaceutical plant which yielded information pertaining to proposed new products, manufacturing capacities and standardization procedures. 14

- The Mexican government requested and received information about an American fertilizer company. 15

- An agent of the Soviet government was granted access to information about an import-export bank. 16

Critics claim that the legislation puts American companies at a disadvantage in their dealings with foreign business. Several American companies have asserted that access by foreign business to their technology has foreclosed their opportunity to licence it. For example, during the course of negotiations for the sale of processing technology for a certain product, Dow Chemical was required to submit information about its process to a government agency. Soon after, the foreign business terminated the negotiations and Dow later discovered that the foreign business had received copies of the information which Dow had filed with the government agency.[17] In another instance, a British firm requested and obtained data about the future direction and planning of a biomedical research group. The group had been successful in patenting one of its ideas and had licensed it,

14 Id.

15 Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (1974).

16 Stone v. Export-Import Bank, 552 F. 2d 132 (1977).

17 Hearings, letter from James H. Hanes, General Counsel of Dow Chemical, supra note 2, 282-83.

but the British firm sought the information to establish its claim that the licensed idea was an infringement of its patent rights.[18]

Although representatives of businesses in Ontario expressed great concern about the increased availability of information to competitors -- both foreign and domestic -- questions about the propriety of disclosures should not be directed at reasons behind the requests. Even if legislation incorporated the Swedish notion of limiting the requestor's use of the information, such an agreement would be difficult to enforce. A test for denial of access should not distinguish between requestors nor should it consider the purpose for which documents are requested. This would be a costly, time-consuming and subjective exercise and would defeat the purpose of access legislation. The only proper issue for inquiry is whether private competitive interests are adequately protected. The Americans have concluded that the problem of potentially objectionable disclosure would best be solved by specific legislation rather than by amendments to statutes of general applicability.

> If the need for special protection of narrowly defined categories of information can be convincingly demonstrated it may be appropriate for Congress to pass separate statutes defining the nature, extent and timing of disclosure. 19

18 Hearings, supra, note 2, 293.

19 Supra, note 5, 13.

The Ontario legislature could also consider the merits of such legislation on a case-by-case basis.

5. Rights of Submitters of Private Data

The United States Supreme Court's recent denial of the rights of submitters to intervene in agency decisions to disclose information, and its conclusion that under the Act exempt information can be disclosed has compounded the uncertainties which surround the protection of private interests.

> [The] test imposes upon agencies and courts the undesirable responsibility of making speculative judgements as to whether, if such information were to be disclosed and if such information were used by a competitor disclosure would cause substantial competitive injury. Such a discussion obviously involves a substantial element of crystal ball gazing and represents a questionable means, at best, for determining if the information is confidential. [20]

This feature of the legislation has many detractors who claim that agency employees frequently do not possess the requisite skills for evaluating the competitive impact of disclosure.[21]

Several American agencies have stated that they do not have the independent capability to evaluate the competitive nature of the private

20 Supra, note 2, 117.

21 Patten and Weinstein, supra, note 3.

competitive data which is furnished to government agencies.[22] To analyze a competitor's position, it might be necessary for the agency to know not only the cost effort and initiative that went into the data's compilation, but also enough about the submitter's business operations to understand why the information would be useful to a competitor or to be able to predict the significance of the data to competitors. In addition, an agency might need to have a basic understanding of market conditions in order to generally assess how disclosure might affect competitive positions.

Detractors further claim that agency employees do not have any direct interest in whether private information is disclosed. Under the terms of the Act, whereby they are subject to full and independent judicial review of their decisions to withhold information, the line of least resistance may in some instances be disclosure. In at least one decision,[23] the court reluctantly released information because the evidence presented by government was inadequate to justify a finding that it should be withheld.

Some agencies have developed practices which attempt to better safeguard private information. For example, several agencies have adopted regulations requiring notice to be given prior to disclosure, and a

22 Supra, note 2.

23 See discussion of Military Audit v. Kettles in Patten & Weinstein, supra, note 3, 205.

recent decision upheld the right of submitters to receive notice before information is disclosed. Other agencies permit submitters to assess the confidentiality of documents when they are filed. Although these procedures provide no assurance that information will be withheld, they do provide greater certainty and fairness and permit agencies and submitters to expedite decisions of confidentiality before they arise. However, the real party in interest is still denied an opportunity to intervene in determinations of competitive harm.

These problems must be examined in the Ontario context. Most government activities in Ontario are conducted by ministries which do not possess the expertise, funding, or manpower of American independent regulatory agencies. Responsibility for determinations of competitive harm would place an unreasonable burden on these ministries. This would result in a more uncertain protection for private data than has been available in the United States. It is therefore proposed that an Ontario statute contain a provision similar to that proposed by the Canadian Bar Association which would assure submitters an opportunity to participate in these determinations. The CBA proposal should be amended so as to make clear that it extends only to submitters of information and not "any affected person."

Submitters would therefore be entitled either to intervene prior to a ministry's determinations or to request a court or other designated tribunal to review a ministry decision to disclose. Canadian courts have not had an opportunity to demonstrate the facility for economic

analysis which has been demanded of American courts. However, with more detailed criteria for competitive harm outlined in the statute, our courts would be able to more fairly assess the competing interests of requestors and submitters after both have had an opportunity to be heard.

6. Government Interests

Some restrictions on public access which protect other legitimate interests of government would meet some of the concerns raised by officials about possible harms to the regulatory, entrepreneurial and economic planning functions. Exemptions covering investigative processes and information that must be withheld under other statutes would exclude many aspects of the regulatory process. An exemption protecting the advice of civil servants would exclude much of the planning process.

The American legislation relies on these and other exemptions to protect governmental interests, but it does not specifically exempt government's competitive interests. Although some concern has been expressed about the need to protect government trade secrets, the absence of provisions covering the competitive interests of government agencies and the economy reflects an American attitude, and to some extent an American reality, that business tends to business, while government tends to governing. This approach, however, may be less

appropriate for Ontario where the public sector performs numerous functions which are left to the American private sector. These activities require government to maintain a competitive position in the marketplace. Greater public access to information generated in the course of these activities raises particularly complex questions for the province which should be given close scrutiny before final determinations are reached on the degree of protection they warrant.

Some protection is indeed necessary. However, given the far-reaching nature of government's participation in the marketplace, an appropriate balance could be found if the exemptions were narrowly drafted. The Canadian Bar Association proposal exempts the competitive interests of public institutions to the same degree as it excludes private ones. However, to equate government and business competitive interests in this fashion would seriously undermine the purpose of granting a right of public access.

The Australian Minority Report protects the financial and commercial information of government agencies engaged in trade and commerce to the same degree as it protects private institutions. If applied to the Ontario context, this would exempt the competitively valuable information of agencies such as Ontario Hydro and the ODC. Such a provision should be included in an Ontario statute, but should be expressly qualified so as to require the disclosure of information which affects the health and safety of Ontario residents. The public should be guaranteed the right to assess the adequacy and completeness of such matters as nuclear safety.

Other specific interests enumerated by the Minority Report Bill -- such as government negotiating strategy, tendering processes, trade secrets and research -- correspond with some of the more important concerns raised in the interviews with officials of various ministries, and should be similarly protected in an Ontario statute.

The Australian Minority Report Bill and the Canadian Bar Association proposals contain almost identical protections for the interests of the economy. Both attempt to enumerate the types of information that could be excluded from public access. Since many of these matters are within federal jurisdiction, an abbreviated version with the appropriate deletions should be considered for an Ontario statute. While some of these matters would be protected under exemptions governing the deliberative processes, factual studies prepared by the province on the advantages and disadvantages of pursuing particular undertakings would not be protected elsewhere. Access to such information could harm the province's competitive position in relation to other provincial and international governments.

COMMISSION RESEARCH PUBLICATIONS

The following list of research publications prepared for the Commission may be obtained at the Ontario Government Bookstore in Toronto, or by mail through the Publications Centre, 880 Bay Street, 5th Floor, Toronto, Ontario M7A 1N8.

Prices are indicated below. Orders placed through the Publications Centre should be accompanied by a cheque or money order made payable to the "Treasurer of Ontario."

The Freedom of Information Issue: A Political Analysis
Research Publication 1
by Prof. Donald V. Smiley, York University $2.00

Freedom of Information and Ministerial Responsibility
Research Publication 2
by Prof. Kenneth Kernaghan, Brock University $2.00

Public Access to Government Documents: A Comparative Perspective
Research Publication 3
by Prof. Donald C. Rowat, Carleton University $3.00

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Research Publication 4
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